

Beyond *Jaffee v. Redmond*: Should the Federal Courts Recognize a Right to Physician-Patient Confidentiality?

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Rule 501 of the Federal Rules of Evidence allows the federal courts to develop evidentiary privileges that will bar the introduction of certain evidence at trial. In Jaffee v. Redmond, the United States Supreme Court recognized a psychotherapist-patient privilege for the first time. This Note argues that technological advancements and changes in the nature of the physician-patient relationship have made many of the ethical concerns identified by the Court in Jaffee increasingly relevant to the doctor-patient relationship generally. Following the Court's logic in Jaffee, the federal courts should recognize a similar evidentiary privilege to protect at least some communications between medical patients and their physicians.

*"If we would guide by the light of reason, we must let our minds be bold."*¹

*"If you ask how [one] is to know when one interest outweighs another,
I can only answer . . . from experience and study and reflection;
in brief, from life itself."*²

I. INTRODUCTION

The physician's duty to protect the confidences of his or her patients is an ancient and time-honored tradition, essential to the well-being of the patient and the integrity of the profession. The systematic medical process of listening to the patient's complaints, diagnosing the problem, and performing a clinical examination, which dates back to ancient Egypt,³ requires the patient to be completely open with his or her doctor in order to facilitate an accurate understanding of the disorder. A recognition of the medical professional's responsibility to maintain his or her patient's confidences from damaging public disclosure—even in defiance of the law—dates to biblical times.⁴ Among all the

* This Note is dedicated to the memory of Samuel R. Silver, and in honor of Phoebe Silver—my Dad and Mom. I would also like to thank Ruth and Joe Starr, Marsha and Fred Korn, Samuel Tobor, and all of my family and friends for their love and support.

¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921).

³ See *MEDICINE: A TREASURY OF ART AND LITERATURE* 29 (Ann G. Charmichael & Richard M. Ratzan eds., 1991).

⁴ See, e.g., *Exodus* 1:15–22.

writings in history concerning medicine and the medical profession, the most famous and influential is the so-called "Hippocratic Oath," the physician's code of ethics attributed to the medical school founded by the great Hellenic physician Hippocrates of Cos (460-390 B.C.E.). The Hippocratic Oath declares:

I swear by Apollo the Physician . . . that I will keep this Oath and this Covenant to the best of my ability and judgement. . . .

Whatever I see or hear concerning the lives of men during the practice of my profession, or even outside of it, I will not divulge, guarding these things as religious secrets.⁵

This oath is still taken today by every physician in the United States upon entering the medical profession.

Today, as we enter the so-called "information age," the protection of medical records and confidential communications between patient and doctor from compelled disclosure is more important than ever before. The desire of insurance companies and health maintenance organizations ("HMOs") to control costs, the increasing influence of potential health care costs in hiring decisions, the Human Genome Project and the rapid advancement in our ability to read an individual's genetic code and predict the future course of his or her life,⁶ and the rapid increase in technology related to compiling, storing, and communicating information all suggest the need to protect such deeply personal and potentially damaging information from public disclosure when the need for such information is less than compelling to the interests of justice. To date, most states have reached a conclusion along these lines and have provided statutory protection for physician-patient communications.⁷ However, the

⁵ *Greek Medical Ethics—The Hippocratic Oath: From the Corpus Medicorum Graecorum*, in *ANCIENT GREECE: DOCUMENTARY PERSPECTIVES* 262-63 (Stylianios V. Spyridakis & Bradley P. Nystrom eds., 1985).

⁶ The Human Genome Project is an ongoing, federally-supported project designed to map out all of the different genes found in human beings (a total estimated at between 50,000 and 100,000 genes) so as to understand their roles in disease, development, and behavior. For a comprehensive study of the history, goals, and socio-ethical issues involved in the Project, see *THE CODE OF CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT* (Daniel J. Kevles & Leroy Hood eds., 1992).

⁷ See, e.g., ALASKA R. EVID. 504; ARIZ. REV. STAT. ANN. § 12-2235 (West 1994); ARIZ. REV. STAT. ANN. § 13-4062(4) (West 1989); ARK. UNIF. R. EVID. 503; CAL. EVID. CODE §§ 990-1007 (West 1966 & Supp. 1983); COLO. REV. STAT. § 13-90-107 (1987 & Supp. 1996); DEL. UNIF. R. EVID. 503; D.C. CODE ANN. § 14-307 (1981); HAW. R. EVID. 504; IDAHO CODE § 9-203 (Supp. 1986); 735 ILL. COMP. STAT. ANN. 5/8-802 (West 1992 & Supp. 1997); IND. CODE ANN. § 34-1-14-5(4) (West 1983 & Supp. 1996); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1997); KAN. STAT. ANN. § 60-427 (1994); ME. R. EVID. 503;

federal courts still abide by the traditional axiom that a physician-patient privilege did not exist at common law and thus have declined to recognize a similar right to the protection of such confidential information.⁸ This difference between state and federal evidentiary law is important because, in a civil action where an item of proof is directed to both a federal and state claim or defense, and the privilege is recognized by state law but not under federal law, the item or information is generally admitted into evidence.⁹ Consequently, the federal

MICH. COMP. LAWS ANN. § 600.2157 (West 1986 & Supp. 1997); MICH. COMP. LAWS ANN. § 767.5a (West 1982 & Supp. 1997); MINN. STAT. § 595.02(1)(d) (West 1988 & Supp. 1997); MISS. CODE ANN. § 13-1-21 (1972 & Supp. 1996); MO. ANN. STAT. § 491.060(5) (West 1996); MONT. CODE ANN. § 26-1-805 (1993); N.H. REV. STAT. ANN. § 329:26 (1995); N.J. STAT. ANN. § 2A:84A-22.2 (West 1994 & Supp. 1997); N.M. R. EVID. 504; N.Y. CIV. PRAC. L. & R. § 4504 (West 1992 & Supp. 1997); N.C. GEN. STAT. § 8-53 (1986); OHIO REV. CODE ANN. § 2317.02(B) (Anderson Supp. 1985); OR. REV. STAT. § 40.235 (1988); 42 PA. CONS. STAT. § 5929 (1982); TEX. R. EVID. 509; UTAH R. EVID. 506; VT. STAT. ANN. tit. 12, § 1612 (Supp. 1996); VA. CODE ANN. § 8.01-399 (Michie 1992 & Supp. 1997); WASH. REV. CODE ANN. § 5.60.060(4) (West 1995 & Supp. 1997); WIS. STAT. ANN. § 905.04 (West Supp. 1986); WYO. STAT. ANN. § 1-12-101 (Michie 1977).

⁸ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977) (stating that “[t]he physician-patient evidentiary privilege is unknown to the common law”); *Gilbreath v. Guadalupe Hosp. Found., Inc.*, 5 F.3d 785 (5th Cir. 1993) (citing *United States v. Mancuso*, 444 F.2d 691, 695 (5th Cir. 1971), and *Barnes v. United States*, 374 F.2d 126, 128 (5th Cir. 1967), in declining to recognize a federal physician-patient privilege).

⁹ See S. REP. NO. 93-1277, at 12 n.17 (1974); cf., e.g., *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100 (3d Cir. 1982) (declining to apply state accountant-client privilege because federal law did not provide for same); *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978) (holding that “in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in litigation”). *Weinstein’s Evidence* observes that the very circumstance

makes no sense whatsoever, because the moment privileged information is divulged [for the purpose of the federal claim,] the point of having the [state] privilege is largely lost . . . [Admittedly,] [t]his solution seems most in accord with the general policies of the federal rules, favoring truth, uniformity and simplicity, but it denigrates the substantive policy behind the state privilege.

2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 501[02], at 501-25 (1996). In testimony before Congress prior to the adoption of the Federal Rules of Evidence, Dr. Thomas G. Dorrity expressed concern that the omission of a general physician-patient privilege “could destroy the hard-won gains in two thirds of the states which [have,] in varying degrees, legislatively recognized the patient’s right to privacy, confidentiality, and privilege.” 119 CONG. REC. S8340 (Mar. 19, 1973) (statement of Dr. Dorrity). Judge Henry J. Friendly likewise offered that, “[i]f a state recognizes a physician-patient privilege, why should not its policy prevail . . . ? What value is there in such a privilege available to one set of courts but not in another?” *Id.* at S8343 (statement of Judge Friendly).

courts' refusal to recognize a physician-patient evidentiary privilege effectively eviscerates the protections provided for by most of the states, and thereby not only unnecessarily compromises patient privacy in an important sphere of the individual's personal life, but also encourages employers or insurance companies to engage in forum shopping when they can remove cases from state to federal courts.¹⁰

Federal Rule of Evidence 501 ("Rule 501") calls for the federal courts to develop evidentiary privileges through "principles of the common law . . . in light of reason and experience."¹¹ Although federal courts have been reluctant to recognize new privileges¹² besides those traditionally recognized at common law,¹³ the United States Supreme Court recently held in a landmark decision, *Jaffee v. Redmond*,¹⁴ that Rule 501 provides for a psychotherapist-patient privilege, protecting patients from the compulsory disclosure of confidential communications by their psychotherapists.¹⁵

This Note proposes that the evidentiary privilege in federal courts under Rule 501 should be extended to cover at least some communications between medical patients and their physicians. In Part II, this Note will discuss the rise and decline of the physician-patient relationship as a constitutionally protected zone of privacy and assess the arguments for and against recognizing physician-patient privilege as a right of informational privacy. In Part III, this Note will describe the common law and statutory development of the physician-patient privilege and its recognition by the Supreme Court in the psychotherapist-patient sphere in *Jaffee*. In Part IV, this Note will examine the Supreme Court's construction of Rule 501 in *Jaffee* and explore the implications of this construction with regard to the recognition by federal courts of a broad-based physician-patient privilege. This Note concludes that Rule 501 should be extended to protect patients from the compulsory disclosure of some confidential communications to their physicians, including information contained in medical records or obtained from genetic material.

¹⁰ See 28 U.S.C. § 1441 (1994).

¹¹ See FED. R. EVID. 501.

¹² Cf. CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 105, at 228 (Edward Cleary 2d ed. 1972) (asserting that "[m]ore than a century of experience with the statutes has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud. Consequently, the abandonment of the privilege seems the best solution").

¹³ Compare *Whalen*, 429 U.S. at 602 n.28 with *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (recognizing an attorney-client privilege under Rule 501 and extending it to communications between a corporation's counsel and employees).

¹⁴ 116 S. Ct. 1923 (1996).

¹⁵ See *id.* at 1931.

II. THE MEDICAL PRIVILEGE AS A CONSTITUTIONAL RIGHT OF PRIVACY

A. *Development of the Informational Right to Privacy*

The concept of a legal right to privacy is an ancient concept that lies at the very foundation of law and civilization.¹⁶ Since the thirteenth century, there has been a growing recognition in Western societies of a fundamental right of personal freedom, or liberty, from the unsolicited interference of public or private authorities into matters of great interest to the individual with comparatively little significance for the Crown, state, or community as a whole.¹⁷

¹⁶ See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419-20 (1974) (stating that "privacy is as old as law, implicated in the concept of the individual and all that is ascribed to the individual—in laws regulating his status and his relations, or protecting his person against assault, his reputation against slander, his property against trespass or conversion"); cf. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (observing that marriage is a "right of privacy older than the Bill of Rights"); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 8-22 (1967) (tracing the concept of a desire for privacy back to primitive society and the animal world, and observing that "[t]he respect given to . . . claims to withhold information [is] part of the way social structure is defined in all societies").

¹⁷ See, e.g., S. AFR. CONST., ch. 2, § 14 ("Everyone has the right to privacy . . .") (adopted May 8, 1996); cf., e.g., DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (France 1789) (codified in CONST. 1791) (Frank Maloy Anderson trans.), reprinted in *CONSTITUTIONS THAT MADE HISTORY* 83-85 (Albert P. Blaustein & Jay A. Sigler eds., 1988), which states in part:

§ 4. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has no limits except those that secure to the other members of society the enjoyment of these same rights. These limits can be determined only by law.

§ 5. The law has the right to forbid only such actions as are injurious to society. Nothing can be forbidden that is not interdicted by the law, and no one can be constrained to do that which it does not order.

Id. Earlier charters articulating basic individual and community liberties include the (English) Bill of Rights, 1689, 1 W. & M. (Eng.), reprinted in 6 STATUTES OF THE REALM 142 (1810); Statute of Kalisz, 1264 (Pol.), reprinted in 1264 Statute on Jewish Liberties in Poland (Thomas O. Macadoc trans.), in IWO CYPRIAN POGONOWSKI, *JEWS IN POLAND: A DOCUMENTARY HISTORY* 39-58 (1993); and MAGNA CHARTA, 1215 (codified in Magna Charta, 25 Edw. (1297)) (Eng.). The Magna Charta's "*per legem terrae*" clause is the direct antecedent of our Due Process clauses. See *id.* at § 39 ("No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land."). Cf. U.S. CONST. amends. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."),

1. *Origins of the Informational Right to Privacy Under the American Constitution*

The first United States Supreme Court decision recognizing privacy as a right under the Constitution was *Boyd v. United States*,¹⁸ in which Justice Joseph P. Bradley stated that the "very [essence] of constitutional liberty and security" lay in the Fourth and Fifth Amendment protections of the individual from "the invasion of his indefeasible right of personal security."¹⁹ In 1890, Samuel D. Warren, Jr. and Louis D. Brandeis published their seminal article *The Right to Privacy*,²⁰ in which they advocated the recognition of a new common law tort action against, or equitable injunction preventing, actions that deprived the individual of the opportunity to determine the extent to which his or her "thoughts, sentiments, and emotions shall be communicated to others,"²¹ except where the matter concerned the general interest or was made public by the individual voluntarily, and regardless of whether the matter was true or was published without malice.²² They warned that changes in technology and culture required recognizing such a right to privacy,²³ which they also referred to as the "right 'to be let alone.'"²⁴ A few months after the publication of the Warren and Brandeis article, the Supreme Court acknowledged the existence of a "right to be let alone" under the Constitution with regard to an individual's

XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

¹⁸ 116 U.S. 616 (1886).

¹⁹ *Id.* at 630.

²⁰ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²¹ *Id.* at 198.

²² *See id.* at 214-20.

²³ Warren and Brandeis asserted that:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 196.

²⁴ *See id.* at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888) ("The right to one's person may be said to be a right of complete immunity; to be let alone.")).

physical person²⁵ and held that a plaintiff in a civil tort action could not be compelled to undergo a surgical examination to determine the extent of the individual's injuries.²⁶ Later, Brandeis himself, as an Associate Justice on the Supreme Court, sought the recognition of a comprehensive right to personal liberty²⁷ and privacy²⁸ under the Constitution, including the protection of private communications from criminalization by the state.²⁹ The right to privacy envisioned by Brandeis throughout his career clearly encompassed a

²⁵ See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

²⁶ See *id.* The opinion was authored by Justice Horace Gray, for whom Brandeis had clerked ten years earlier. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 32–33 (1984); LEWIS J. PAPER, *BRANDEIS* 23–25 (1983). Gray's respect for Brandeis, his penchant for scholarship, and his affiliation with Harvard Law School support the contention that this recognition of privacy was a direct extension into the constitutional sphere of Warren and Brandeis's proposed tort right, even though the opinion itself was something of a paean to notions of interpretivism and judicial restraint. *Botsford* was effectively overturned in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), in which the Court held that the adoption of Federal Rule of Civil Procedure 35 gave the courts the power to compel a medical examination of a party, which the Court in *Botsford* had held they did not (then) possess.

²⁷ Brandeis attributed to the Framers the ideal "that the final end of the State was to make men free to develop their faculties," see *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), and asserted that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Id.* at 373 (Brandeis, J., concurring).

²⁸ See, e.g., *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (recognizing the "right to be let alone" of members of a captive audience from advertising billboards).

²⁹ See *Gilbert v. Minnesota*, 254 U.S. 325, 334–43 (1920) (Brandeis, J., dissenting) (asserting that the First and Fourteenth Amendments protect the privacy of the home and family with regard to matters of personal conscience, such as where state or federal laws purport to prohibit the teaching of a particular doctrine or belief). Brandeis's views largely parallel many of those expounded by James Madison, as reflected in the legislative history of the federal Bill of Rights. See *House of Representatives Debates, May-June, 1789* (statement of Rep. Madison, June 8, 1789), reprinted in 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026–28 (Bernard Schwartz ed., 1971) [hereinafter *THE BILL OF RIGHTS*] (quoting Madison's nine proposed constitutional amendments—collectively, the direct forerunner of the Bill of Rights—including a positive right to "the enjoyment of life and liberty . . . and generally of pursuing and obtaining happiness and safety" in his first proposed amendment (as well as the correlative negative guarantee against federal deprivation of this right in his fourth proposed amendment, which was ultimately ratified as part of the Fifth Amendment); a guarantee in his fourth proposed amendment against "the full and equal rights of conscience be[ing] in any manner, or in any pretext, infringed" by the federal government; and a prohibition against any state infringement upon these "equal rights of conscience" in his fifth proposed amendment. *Id.* at 1026–27. These provisions were approved by the House, but were discarded by the Senate and thus not submitted to the respective state legislatures for ratification. See *id.* at 1053).

broad right to the protection of personal information from unwarranted public disclosure, including an evidentiary privilege.³⁰

2. *The Recognition of a Right to Informational Privacy*

The modern groundwork for an informational right to privacy was established by Justices William O. Douglas and John Marshall Harlan in their dissenting opinions in *Poe v. Ullman*,³¹ a case which addressed the constitutionality of a Connecticut statute which forbade the use or encouragement of the use of any contraceptive drug or device.³² The Court dismissed the action on jurisdictional grounds.³³ However, Justices Douglas and Harlan, writing in dissent, argued that the decision should have reached the merits of the case and sketched out their ideas for resolving the issue presented. Justice Douglas observed that “[t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion.”³⁴ He touched on the notion of liberty “gain[ing] content from the emanations of other specific guarantees” in the Bill of Rights³⁵ and expressed his belief that the statute violated the Fourteenth

³⁰ Writing in dissent in *Olmstead v. United States*, Brandeis declared:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. *And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.*

Olmstead v. United States, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting) (emphasis added).

³¹ 367 U.S. 497 (1961).

³² See *id.* at 498–500 (citing CONN. GEN. STAT. §§ 53-32, 54-196 (1958)).

³³ See *id.* at 502–09.

³⁴ *Id.* at 513 (Douglas, J., dissenting) (decrying the “sealing of the lips of a doctor because he desires to observe the law, obnoxious as the law may be”).

³⁵ See *id.* at 517 (Douglas, J., dissenting) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

Amendment's Due Process Clause.³⁶ He concluded that the statute at issue constituted "an invasion of the privacy that is implicit in a free society"³⁷ that "emanates from the totality of the constitutional scheme under which we live."³⁸ Justice Harlan, in his dissent, argued that due process goes beyond any formula, but represents "the balance which our Nation . . . has struck between that liberty [of the individual] and the demands of organized society," and which the Court should determine through "judgment and restraint."³⁹

Four years later, the Supreme Court recognized a federal constitutional substantive right to privacy in *Griswold v. Connecticut*.⁴⁰ In *Griswold*, the Court readdressed the constitutionality of the same state statute as the one at issue in *Poe*.⁴¹ Justice Douglas, this time writing for the Court, drew on and embellished upon his dissenting opinion in *Poe*, delineating the existence of "penumbras"⁴² emanating from the specific constitutional guarantees, such as the right of association implied by the First Amendment,⁴³ and the "zones of privacy" created by the First, Third, Fourth, and Fifth Amendments, in conjunction with the Ninth Amendment.⁴⁴

³⁶ See *id.* at 521 (Douglas, J., dissenting) (asserting that if the state "can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife").

³⁷ *Id.* at 521 (Douglas, J., dissenting).

³⁸ *Id.* (Douglas, J., dissenting) (citation omitted).

³⁹ *Id.* at 542 (Harlan, J., dissenting). Justice Harlan described the liberty interest as comprising "not a series of isolated points . . . [but] a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints" and which "recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.* at 543 (Harlan, J., dissenting).

⁴⁰ 381 U.S. 479 (1965).

⁴¹ See *id.* at 480.

⁴² Cf. *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (describing the right to be let alone articulated by Justice Brandeis as one arising from a "penumbra of the Fourth and Fifth Amendments" (emphasis added), which Justice Oliver Wendell Holmes "[did] not deny" but was also "not prepared" to accept (emphasis added)).

⁴³ See *Griswold*, 381 U.S. at 483-84 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)).

⁴⁴ See *id.* at 482, 484-86 (citing the "penumbral rights of 'privacy and repose'" cast by the First Amendment's implicit right of association, Third Amendment's prohibition against quartering soldiers in peace time, Fourth Amendment's protection against illegal searches and seizures, and Fifth Amendment's self-incrimination privilege clause, as interpreted in light of the Ninth Amendment's reservation clause). In this respect, Justice Douglas's quest for constitutional privacy resembles Chief Justice John Marshall's search through the Constitution for a "penumbral" requirement of judicial review. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Justice Douglas also cited the probable overbreadth of the statute in

Justice Harlan, concurring, drew heavily from his own dissent in *Poe* in suggesting that the state's infringement upon the appellant's privacy interest violated the Fourteenth Amendment's Due Process Clause.⁴⁵ While Justice Douglas's opinion for the Court established constitutional recognition of the right to privacy, it was Justice Harlan's concurring opinion that established the precedent the Court would follow in the subsequent expansion of the privacy doctrine.⁴⁶

Subsequent to *Griswold*, the Court expanded the domain of constitutional informational privacy to include both a procedural right under the Fourth and

question and traditional respect for the privacy inherent in the marital relationship to justify the decision. *See Griswold*, 381 U.S. at 482, 485-86. Interestingly, Justice Douglas originally intended to base the *Griswold* opinion entirely on the First Amendment right of association discovered in *NAACP*, but at Justice William J. Brennan, Jr.'s urging, instead adopted the landmark "zones of privacy" approach. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 338-39 (1993) [hereinafter SCHWARTZ, HISTORY].

⁴⁵ *See Griswold*, 381 U.S. at 499-502 (Harlan, J., concurring). Justice Byron R. White also wrote a separate concurrence relying upon the Due Process Clause. *See id.* at 502-07 (White, J., concurring). Justice Arthur J. Goldberg, while joining Justice Douglas's opinion, concurred separately to emphasize the role of the Ninth Amendment as an expression by the Framers that "fundamental rights exist that are not expressly enumerated in the first eight amendments" and that "the list of rights included there [are] not [to] be deemed exhaustive." *Id.* at 492 (Goldberg, J., concurring). He asserted that the Ninth Amendment extends protection from government infringement to those fundamental rights not specified in the Bill of Rights, *see id.* at 486-96 (Goldberg, J., concurring), but "which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488 (Goldberg, J., concurring). Because privacy in marriage is "so basic and fundamental and so deep-rooted in our society," *id.* at 491 (Goldberg, J., concurring), and "as old and as fundamental as our entire civilization," it is "protected from abridgement by the Government though not specifically mentioned in the Constitution" via the Due Process Clause. *Id.* at 496 (Goldberg, J., concurring).

⁴⁶ It was clearly Justice Douglas's intention in *Griswold* to guide the newfound right to privacy between the Odyssean Scylla and Charybdis of substantive due process and judicial restraint—the former still tainted with the stigma of *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny, and the latter compelling the denial of relief—by declining any reliance on the Fourteenth Amendment and instead finding privacy to be a pervasive characteristic of the acknowledged substantive privileges of the Bill of Rights. *See Griswold*, 381 U.S. at 481-82. Justice Harlan, however, had not joined the opinion of the Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and thus had never committed himself to the repudiation of substantive due process. *See Griswold*, 381 U.S. at 523 & n.18 (Black, J., dissenting). This allowed Justice Harlan the freedom to discover a right to privacy under the Due Process Clause without violating the integrity of his established judicial philosophy. In *Roe v. Wade*, 410 U.S. 113 (1973), the right to privacy was explicitly recognized by the Court as one falling under the Fourteenth Amendment. *See id.* at 153.

Fifth Amendments,⁴⁷ and a substantive right derived from the First,⁴⁸ Ninth,⁴⁹ and Fourteenth Amendments⁵⁰ over fundamental aspects of an individual's

⁴⁷ See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613–14 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government."); *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977) (quoting Philip B. Kurland, *The Private I*, U. CHI. MAG. 7, 8 (Autumn 1976), in stating that the individual has a right "to be free . . . from governmental surveillance and intrusion"); *Katz v. United States*, 389 U.S. 347, 351 (1967) (finding that "the Fourth Amendment protects people, not places," and thus "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"); *id.* at 361–62 (Harlan, J., concurring) (contending that the Fourth Amendment affords protection from warrantless searches where one has a subjective expectation of privacy that society recognizes as objectively reasonable); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (quoting *United States v. Grunewald*, 233 F.2d 556, 581–82 (2d Cir. 1956) (Frank, J., dissenting), in stating that the Fifth Amendment protects each individual's right "to a private enclave where he may lead a private life"); see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 299–300 (4th ed. 1878) ("The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures.").

⁴⁸ See *Stanley v. Georgia*, 394 U.S. 557 (1969). Justice Thurgood Marshall's opinion for the Court asserted that:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565. See also *Roberts v. United States Jaycees*, 468 U.S. 609, 617–19 (1984) (recognizing "freedom of intimate association" which secures certain human relationships from "undue intrusion by the State"); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *cf.* *Cohen v. California*, 403 U.S. 15, 18–22 (1971) (delineating spheres where individual privacy may trump another's right to free speech).

⁴⁹ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (citing the Ninth Amendment in observing that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"); *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (stating that "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality" are "aspects of the right to privacy" that are "retained by the people" in the meaning of the Ninth Amendment").

⁵⁰ See, e.g., *Casey*, 505 U.S. at 847 (asserting that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"); *Whalen*, 429 U.S. at 599 (stating that the individual has an interest in avoiding the disclosure of personal matters); *id.* at 599–600 (stating that the individual has an "interest in independence in making certain kinds of important decisions"); *cf.* *Rochin v. California*, 342 U.S. 165, 172 (1952)

autonomy⁵¹ or "personhood"⁵² implicit in the liberty interest of the Fourteenth Amendment's Due Process Clause.⁵³ The procedural aspect of the right has been applied to prevent the state from using evidence obtained in a manner

(holding that "[i]llegally breaking into the privacy of the petitioner" is "conduct that shocks the conscience" and violates the Fourteenth Amendment right to Due Process); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (acknowledging a "private realm of family life which the state cannot enter").

⁵¹ See, e.g., Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446-57 (1983); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (contending that privacy necessitates "an autonomy or control over the intimacies of personal identity"); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-1, at 1302 (2d ed. 1988) (stating that "privacy is nothing less than society's limiting principle"); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 545 (1970), *quoted in* David L. Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 588 (1977) (contending that "the concept of a right to privacy attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual of a zone in which to be an individual, not a member of the community"); Charles Fried, *Privacy*, 77 YALE L.J. 475, 493 (1968) (defining privacy as "that aspect of social order by which persons control access to information about themselves"); Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974) (contending that "privacy is control over when and by whom the various parts of us can be sensed by others"); cf. JOHN STUART MILL, *ON LIBERTY* 9 (Alburey Castell ed. 1947), articulating the principle that:

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . Over himself, over his own body and mind, the individual is sovereign.

Id.

⁵² The term "personhood" has pervaded privacy doctrine to such an extent that it is often regarded as the value underlying the right to privacy, and is sometimes even used synonymously with the right itself. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752 (1989). It "includes elements of the concepts of individuality, autonomy, and privacy, but none of these words is sufficient." J. Braxton Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702. Cf. Warren & Brandeis, *supra* note 20, at 205 (referring to the "inviolate personality").

⁵³ See *Casey*, 505 U.S. at 851. The Court contended that:

matters . . . central to personal dignity and autonomy . . . are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id.

deemed unconstitutional in a criminal prosecution, whereas the substantive aspects of the right⁵⁴ have been applied to prevent the state from interfering in certain "zones of privacy"⁵⁵ relating to personal information about or fundamental rights of the individual.

B. *The Decline of the Informational Right to Privacy*

In 1973, the Supreme Court held in *Roe v. Wade*⁵⁶ that the right to privacy encompasses a woman's right to obtain an abortion prior to the fetus reaching viability outside of the womb.⁵⁷ Justice Harry A. Blackmun's opinion for the Court vested this right in a complex interaction among several factors, most notably the privacy inherent in the physician-patient relationship,⁵⁸ as well as the woman's fundamental right to choose to terminate her pregnancy⁵⁹ and the

⁵⁴ The various aspects of privacy have been distinguished in a variety of ways. Justices Brennan and Douglas identified three distinct freedoms. See SCHWARTZ, HISTORY, *supra* note 44, at 358 (noting that the three freedoms are "first, freedom from bodily restraint or inspection, freedom to do with one's body as one likes, and freedom to care for one's health and person; second, freedom of choice in the basic decisions of life . . . ; and, third, autonomous control over the development and expression of one's intellect and personality"); cf. *Doe v. Bolton*, 410 U.S. 179, 210-15 (1973) (Douglas, J., concurring). Others have distinguished among privacy inhering in the place, person, or relationship. See P. ALLAN DIONISOPOULOS & CRAIG R. DUCAT, THE RIGHT TO PRIVACY: ESSAYS AND CASES (1976); cf. Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976), between interests in the collection of data about oneself and the dissemination of that information, see Bazelon, *supra* note 51, at 613, or between aspects of the right that look inward toward the individual from society's outmost perimeter, and outward toward society from the individual, see TRIBE, *supra* note 51, § 15-1, at 1302-04. Professor Ken Gormley distinguishes five separate "species" of privacy: tort privacy, Fourth Amendment privacy, First Amendment privacy, fundamental-decision privacy, and state constitutional privacy. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340.

⁵⁵ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁵⁶ 410 U.S. 113 (1973).

⁵⁷ See *id.* at 153.

⁵⁸ See *id.* at 163-66 (holding that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician"). At conference, the justices' discussion centered on the issue of the physician's right to exercise his professional judgment. See SCHWARTZ, HISTORY, *supra* note 44, at 340-41; BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 169 (1979); Philippa Strum, *Harry Andrew Blackmun*, in THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 15, 18 (Melvin I. Urofsky ed., 1994).

⁵⁹ See *Roe*, 410 U.S. at 153-55.

state's interest in protecting potential human life.⁶⁰ Thus, the Court explicitly recognized the right to privacy over the physician-patient relationship that was implicit in its decision in *Botsford*.⁶¹ However, the opinion also limited the potential scope of constitutional privacy, finding that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."⁶² Thus, although the decision acknowledged a constitutional right to privacy with regard to the doctor-patient relationship, it limited this right to those aspects of the relationship that could impede a woman's ability to obtain medical services deemed to be fundamental rights and did not encompass a general privacy interest in confidential physician-patient communications.⁶³

In *Whalen v. Roe*,⁶⁴ the Court recognized that the right to privacy consisted of at least two distinct interests: the "individual interest in avoiding disclosure of personal matters,"⁶⁵ and the "interest in independence in making certain kinds of important decisions."⁶⁶ The New York law at issue, establishing a centralized computer file containing the names and addresses of all individuals who receive, pursuant to a doctor's prescription, certain drugs deemed to have illegitimate as well as legitimate uses,⁶⁷ was challenged by patients and

⁶⁰ See *id.* at 160-66 (holding that the state's interest in protecting potential human life becomes compelling at the point of viability).

⁶¹ See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891), discussed *supra* in notes 25-26 and accompanying text.

⁶² *Roe*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court, synthesizing precedent, extended this right to activities related to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.* at 152-53.

⁶³ The reaches of this fundamental rights approach were clarified in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976). *Danforth* struck down spousal and parental consent laws, but upheld a state requirement that a woman give written consent in order to receive an abortion. See *id.* at 65-82. It also upheld recordkeeping provisions that were reasonably related to preserving maternal health and "properly respect[ful] [of] a patient's confidentiality and privacy." *Id.* at 80.

⁶⁴ 429 U.S. 589 (1977).

⁶⁵ *Id.* at 599.

⁶⁶ *Id.* at 599-600.

⁶⁷ See *id.* at 591 (citing 1972 N.Y. PUB. HEALTH LAW § 3300 (McKinney Supp. 1976-1977)). The law required that the State Health Department be provided with a form recording information concerning every prescription for a Schedule II drug—including the names of the prescribing physician, dispensing pharmacy, drug and dosage, as well as the patient's name, address, and age—with "pertinent data" recorded on tapes for computer processing for the purpose of preventing these drugs from being diverted into unlawful channels. See *id.* at 591-93.

physicians concerned that the computerized data bank program, and fear of its misuse, would cause patients to decline treatment.⁶⁸ The district court enjoined enforcement of the statute, finding it needlessly broad and intruding on a constitutionally protected zone of privacy.⁶⁹ The Supreme Court unanimously reversed, finding the statute's privacy safeguards sufficient that the program "does not, *on its face*, pose a *sufficiently grievous* threat . . . to establish a constitutional violation."⁷⁰ Thus, while the Court recognized the informational right to privacy, it applied a balancing test to determine whether a constitutionally recognized liberty interest had been violated,⁷¹ rather than the strict scrutiny test applied to infringements upon fundamental rights or the rational basis test traditionally applied otherwise.⁷² The Court affirmed this approach in *Nixon v. Administrator of General Services*.⁷³ Thus, *Whalen* offered the promise of a constitutionally protected right to informational privacy within the physician-patient relationship, but vested courts with only an intermediate level of scrutiny with which to evaluate state infringements upon this right.

⁶⁸ See *id.* at 595.

⁶⁹ See *Roe v. Ingraham*, 403 F. Supp. 931, 937 (S.D.N.Y. 1975) (finding that "[a]n individual's physical ills and disabilities, the medication he takes, [and] the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities Indeed, generally one is wont to feel that this is nobody's business but his doctor's and his pharmacist's"). The Court found that only a compelling interest, narrowly tailored, may justify governmental impingement upon this right of privacy, and held the law at issue unconstitutional. See *id.* at 937-38.

⁷⁰ *Whalen*, 429 U.S. at 600 (emphasis added).

⁷¹ See *id.* at 601-02 (holding that "the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program"); *id.* at 605-06 (noting that the Court was upholding only the statute at issue); *cf. id.* at 606 (Brennan, J., concurring) (emphasizing that without the protections specifically provided for in the New York statute, the statute would be struck down in the absence of a compelling state interest).

⁷² *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

⁷³ 433 U.S. 425, 457-65 (1977) (holding that the Act at issue was constitutional due to the important public interest in materials sought which, taken in concert with regulations aimed at "preventing undue dissemination of private materials," outweighed the former President's expectation of privacy); *cf. Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983). Several federal courts have subsequently applied similar balancing tests in evaluating informational privacy interests. See *In re Search Warrant (Sealed)*, 810 F.2d 67, 71-72 (3d Cir. 1987) (applying balancing test in finding medical records to be within a constitutionally protected sphere); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 146-50 (1991).

The Court has subsequently vacillated between extending and retracting this right to informational privacy in the medical sphere. Within the context of the abortion debate, the Court briefly asserted the right to privacy to invalidate laws intruding into the doctor-patient dialogue.⁷⁴ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁵ however, the Court upheld most of the previously considered regulations intruding upon the physician-patient relationship⁷⁶ based on an "undue burden" test.⁷⁷ *Casey* also considered the recordkeeping requirements of the Pennsylvania statute at issue, which mandated that a report be filed with the state identifying detailed information about the patient and physician, but not the patient's name.⁷⁸ The Court upheld these as well because they served a valid purpose and did not impose an undue burden on the woman's fundamental right to obtain an abortion.⁷⁹

The Court also considered the scope of physician-patient privacy in *Cruzan v. Director, Missouri Department of Health*⁸⁰ and *Washington v. Glucksberg*,⁸¹ two cases addressing the reach of the Due Process Clause with regard to the so-called "right to die with dignity."⁸² In *Cruzan*, a majority of the Court

⁷⁴ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking down laws requiring that the physician tell his or her abortion patients that the fetus she is carrying is a human life and describe it in detail, that the physician not delegate the duty of informed consent, that the patient wait twenty-four hours before receiving an abortion, that the physician inform the patient of financial incentives to keep the child, and that the physician provide state-supplied printed materials designed to discourage abortion); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (striking down laws similar to those in *Thornburgh*, *supra*, except for the last two).

⁷⁵ 505 U.S. 833 (1992).

⁷⁶ See *id.* at 884 (holding that "[w]e see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here"); see also *id.* at 872-73 (rejecting *Roe*'s trimester formula); *id.* at 885-86 (upholding twenty-four hour waiting period); *id.* at 887-88 (upholding informed consent requirement). The Court did, however, affirm the "essential holding" of *Roe* that a woman has a fundamental right to an abortion, see *id.* at 846, 852-53, 857-61, 869-72, 878-79, and struck down a spousal consent requirement, see *id.* at 887-98.

⁷⁷ See *id.* at 877-78 (holding that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations . . . are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose").

⁷⁸ See *id.* at 900. Where state-funded institutions are involved, this information becomes public. See *id.*

⁷⁹ See *id.* at 900-01.

⁸⁰ 497 U.S. 261 (1990).

⁸¹ 117 S. Ct. 2258 (1997) (opinion of Court and opinion of Souter, J., concurring); 117 S. Ct. 2302 (1997) (opinions of O'Connor, Stevens, Ginsburg, and Breyer, JJ., concurring).

⁸² *Glucksberg*, 117 S. Ct. at 2311 (Breyer, J., concurring).

acknowledged that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment,"⁸³ but asserted that the state may require "clear and convincing evidence" that this is indeed the patient's intention.⁸⁴ In *Glucksberg*, the Court was asked to consider whether a competent, terminally ill patient has a constitutional right to have a physician actively assist him or her in ending his or her life. However, the Court largely avoided the physician-patient privacy issue by framing the question presented as one of "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."⁸⁵ The Court unanimously held that there was no such right and that the statute in question prohibiting physician-assisted suicide was thus facially valid.⁸⁶ Even so, five justices suggested a willingness to find the statute unconstitutional as applied to certain situations.⁸⁷

⁸³ 497 U.S. at 278 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905); *Washington v. Harper*, 494 U.S. 210, 221-22, 229 (1990); *Vitek v. Jones*, 445 U.S. 480, 494 (1980); *Parham v. J.R.*, 442 U.S. 584, 600 (1979)).

⁸⁴ See *id.* at 282-87.

⁸⁵ *Glucksberg*, 117 S. Ct. at 2269.

⁸⁶ See *id.* at 2271. The Court found that "[t]he decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection." *Id.* at 2270. Because such a right is neither "deeply rooted in our history and traditions, [n]or so fundamental to our concept of constitutionally ordered liberty," the Court held that it is "not a fundamental liberty interest protected by the Due Process Clause." *Id.* at 2271. On the contrary, the Court held that the state "has an 'unqualified interest in the preservation of human life.'" *Id.* at 2272 (quoting *Cruzan*, 497 U.S. at 282). The Court declined to apply a balancing approach that would "weigh exactly the relative strengths of these various interests," *id.* at 2275, finding it sufficient that the statute was reasonably related to an important state interest. See *id.* at 2271-75. However, the opinion concluded by acknowledging that the debate will and should continue in the context of the democratic dialogue. See *id.* at 2275. Consistent with this approach, the Court has subsequently refused to review a Ninth Circuit Court of Appeals decision upholding Oregon's Death With Dignity Act (Measure 16) permitting physician-assisted suicide. See *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997), *cert. denied sub nom. Lee v. Harclerod*, No. 96-1824, 1997 WL 274930 (U.S. Oct. 14, 1997).

⁸⁷ Justice Sandra Day O'Connor drew a distinction between the Court's opinion that there is no "right to commit suicide which itself includes a right to assistance in doing so," which she joined, and the narrower issue of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death," which she saw no need to address. *Washington v. Glucksberg*, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring); *cf. id.* at 2310 (Ginsburg, J., concurring); *id.* at 2311-12 (Breyer, J., concurring). Justice Stevens contended that while "the State's interest in the contributions each person may make to society outweighs the person's interest in ending her life, this interest does not have the same force for a terminally ill patient faced not with the choice of whether to live, [but] only of how to

Another important case addressing the constitutional limits of government involvement with physician-patient communications is *Rust v. Sullivan*.⁸⁸ In *Rust*, the Court upheld against a Fifth Amendment Due Process challenge the Department of Health and Human Services regulations barring Title X funds from being used to encourage or promote abortions⁸⁹ and expressly prohibiting a physician acting in his or her capacity as a Title X project recipient from referring a pregnant woman to a doctor who performs abortions "even upon specific request."⁹⁰ The Court distinguished *Akron* and *Thornburgh*, which struck down governmental intrusions into the doctor-patient dialogue, by noting

die." *Id.* at 2308 (Stevens, J., concurring). He offered that "the State's legitimate interest in preventing abuse does not apply to an individual who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying." *Id.* (Stevens, J., concurring). Justice David H. Souter compared the need for physician assistance in suicide to that in obtaining an abortion, *see id.* at 2288-90 (Souter, J., concurring), and implied that the individual interest "might in some circumstances, or at some time, be seen as 'fundamental' to the degree entitled to prevail," but saw no need to reach that issue in the present case, and further determined that the state's interests were "sufficiently serious" that the statute in question did not facially constitute an "arbitrary or purposeless restraint." *Id.* (Souter, J., concurring). Justices Souter, Stevens, O'Connor, Ruth Bader Ginsburg, and Stephen G. Breyer all emphasized the patient's right to obtain medication to "alleviate . . . suffering, even to the point of causing unconsciousness and hastening death," as well as the state's interest in protecting incompetent or coerced patients from decisions that are "not truly voluntary." *Id.* at 2303 (O'Connor, J., concurring); *cf. id.* at 2311-12 (Breyer, J., concurring); *id.* at 2288 (Souter, J., concurring).

⁸⁸ 500 U.S. 173 (1991).

⁸⁹ *See id.* at 178-81, 203.

⁹⁰ *Id.* at 180. The Court offered that an acceptable response to such a request would be for the doctor to inform his or her patient that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* The Court defended the decision, offering that, because the program does not provide post-conception medical care, "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her," and a doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* at 200. The Court added that the regulations at issue "do not significantly impinge upon the doctor-patient relationship." *Id.* Justice Blackmun's dissent charged the Court with upholding content-based and viewpoint-based regulations of speech and advocacy, *see id.* at 207-11 (Blackmun, J., dissenting), and with undermining "the legitimate expectations of the patient and the ethical responsibilities of the medical profession." *Id.* at 213-14 (Blackmun, J., dissenting). *Cf. Dorothy E. Roberts, Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 594-95 (1993) (contending that *Rust* distorts the patient's impressions of the health consequences of pregnancy).

that the intrusion at issue here left available other alternatives for obtaining information concerning abortions; thus no fundamental right was abridged.⁹¹

C. Analysis

1. *Construing the Constitution: The Interpretivist-Noninterpretivist Debate*

Because a right to informational privacy is not expressly guaranteed in the Constitution, the recognition of a related right such as physician-patient privilege is necessarily subsumed within the broader context of determining the appropriate construction of the Constitution's ambiguous provisions. Most theories of constitutional construction fall into one of two schools of thought, known generically as the interpretivist and noninterpretivist schools.⁹² The interpretivist position⁹³ contends that the meanings of the various provisions of the Constitution are limited to the plain meaning of the text, or where the text is ambiguous, are frozen in time as they were understood at the moment of ratification and cannot be changed except by subsequent constitutional amendment. It also proposes that recognized rights should not be generalized as abstract principles applicable to unforeseen or unanticipated circumstances.⁹⁴

⁹¹ See *Rust*, 500 U.S. at 203.

⁹² This distinction in interpretational theory should be differentiated from the activist-versus-restraintist debate concerning the judge's institutional role with respect to the judiciary's co-equal branches of government. Although interpretivists tend to espouse judicial restraint and noninterpretivists tend to favor judicial activism, there have been (and continue to be) many exceptions to this tendency, such as Justice Felix Frankfurter, a noninterpretivist who practiced judicial restraint, and Justice Hugo L. Black, a strict interpretivist who could also be deemed a judicial activist.

⁹³ As used here, "interpretivism" includes a broad spectrum of approaches variously termed "originalist," "positivist," "authoritative reasoning," "strict constructionist," "textualist," "new textualist," "intentionalist," "literalist," and "original understanding." Although related, these terms should not necessarily be regarded as interchangeable. See Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 1, 23 (Amy Gutmann ed., 1997) (contrasting his "textualism" with "so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute").

⁹⁴ Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (Scalia, J.) (suggesting that the claim of a constitutional right should be evaluated at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

The noninterpretivist school,⁹⁵ by contrast, sees the words of the Constitution as general premises designed to provide guidance to future generations, but whose specific meanings should be understood in light of extratextual sources and are intended to change or evolve over time.⁹⁶ It accepts the view that contemporary understandings can supplement and even supersede the original meaning of the Constitution's text, and favors interpreting the specific protections in the text at higher levels of abstraction.⁹⁷

Interpretivism is founded on the principle that we have a "government of laws, and not of men,"⁹⁸ and it is typically justified as being essential to the interests of "democracy,"⁹⁹ "predictability,"¹⁰⁰ and the need to "secure" rights

⁹⁵ The noninterpretivist school is variously termed "nonoriginalist," "realist," "pragmatic," "arbitrary reasoning," "nontextualist," "extra-textualist," "supplementalist," "aspirationist," "living Constitution-ist," or "evolutionistic."

⁹⁶ This is an ancient debate that antedates the American Constitution by at least two millennia. The dichotomy between written law and circumstantial fairness was recognized in ancient Greece, *see* ARISTOTLE, THE NICHOMACHEAN ETHICS bk. 5, ch. 2, at 144 (J.E.C. Welldon ed., 1987), and the need to resolve conflicts between unambiguous text and unforeseen circumstances was understood in ancient Judah-Israel, *see* Numbers 26:52-56; 27:1-11. Although it is unclear when the interpretivist-noninterpretivist debate first emerged, it was vibrant during the early Roman Empire, *see* Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539 (1995), and it pervades the annals of Western religio-philosophical jurisprudence. *See* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

⁹⁷ *See* Missouri v. Holland, 252 U.S. 416, 433 (1920) (contending that the words of the Constitution "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism"); *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 73 (1996) (stating that "the Bill of Rights sets out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction").

⁹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁹⁹ More specifically, it presumes that when an amendment to the Constitution is approved by the people, it is approved with a particular understanding in mind, and thus it is undemocratic for unelected judges to alter this meaning to suit what they personally believe to be the exigencies of the time. *See, e.g.,* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 5 (1990) (asserting that "judges must consider themselves bound by law that is independent of their own views of the desirable . . . [and must] apply the law as those who made the law wanted [them] to"); LEARNED HAND, THE BILL OF RIGHTS 73 (1958) (rejecting as "most irksome" the notion of being "ruled by a bevy of Platonic guardians"); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) (describing the "pure interpretive model" as one subscribing to the philosophy that "[t]he people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply"); John Hart Ely, *The Wages of Crying Wolf: A Comment on*

over time and insulate them from the political process.¹⁰¹ Noninterpretivism, on the other hand, is founded on the principle that “[w]e must never forget, that it

Roe v. Wade, 82 YALE L.J. 920, 949 (1973) (“A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.”). Noninterpretivists who advocate judicial restraint have expressed similar sentiments. Justice White, for example, has argued that:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cautioning that “we must be ever on our guard, lest we erect our prejudices into legal principles”). As Judge Andrew Kleinfeld has observed:

The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary That an issue is important does not mean that the people, through their democratically elected representatives, do not have the power to decide it.

Compassion in Dying v. Washington, 79 F.3d 790, 857 (9th Cir. 1996) (Kleinfeld, J., dissenting), *rev’d sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

¹⁰⁰ Presumably, the original intent is the easiest and most enduring definition to discern, and thus allows individuals to create expectations and plan their lives. In the words of Justice Scalia, “[p]redictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (observing that “[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject”); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) (stating that “nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law”); cf. Abner J. Mikva, *The Care and Feeding of the United States Constitution*, 91 MICH. L. REV. 1131, 1131 (1993) (observing that “[t]here can hardly be much disagreement that the Court does a poor job of preserving the Constitution as an intelligible document”).

¹⁰¹ Justice Scalia, citing the Contract Clause as an example, contends that if liberties can be expanded upon, they can also be taken away—“[n]onoriginalism, in other words, is a two-way street that handles traffic both to and from individual rights.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855–56 (1989). See also Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993) (observing that “penumbras and emanations are dangerous business”); cf. *Rochin v. California*, 342 U.S. 165, 175 (1942) (Black, J., concurring) (asserting that “faithful

is a *constitution* we are expounding . . . intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."¹⁰² It draws its claim to legitimacy on the grounds that unrestrained majoritarian democracy may be tyrannical to minorities,¹⁰³ that originalism is something of a myth because no such intent or understanding can be definitively ascertained,¹⁰⁴ that interpretivism is itself a value choice,¹⁰⁵ that the Ninth and

adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by . . . nebulous standards").

¹⁰² *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

¹⁰³ In the words of Justice Brennan:

Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature [Because amending the Constitution is so difficult, to] remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances.

William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 6 (1985).

¹⁰⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring). Justice Jackson stated:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.

Id. See also *Towne v. Eisner*, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."); cf. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34-162 (1991) (challenging the notion that our Constitution exists as a continuum, from the nation's founding to the present, in embodying America's "higher law," and discussing the problem of "intergenerational synthesis"—i.e., the difficulty in determining whether and to what extent amendments passed by a subsequent generation represent a modification or repudiation of those constitutional principles established by the preceding generation when the principles conflict); 2 *THE BILL OF RIGHTS*, *supra* note 29, at 1066 (quoting Representative Roger Sherman's argument that subsequent amendments to the Constitution should be added as a "supplement" at the end of the document, rather than interspersed throughout the original text, because "[w]e might as well endeavor to mix brass, iron, and clay, as to incorporate such heterogeneous articles"); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 6 (1991) (stating that the Framers "bequeathed to subsequent generations a framework for balancing liberty against power.

Fourteenth Amendments to the Constitution contain provisions explicitly calling for an expansive interpretation of constitutional rights,¹⁰⁶ that liberty precedes

However, it is only a framework; it is not a blueprint"); Brennan, *supra* note 103, at 2, 4-5 (stating that it is impossible to discern whether the courts should look to the drafters, congressional disputants, or state ratifiers to identify the true source of the "original intent" or "original understanding," and accusing those who profess fidelity to the original text of "arrogance cloaked as humility"). Compare *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525-30 (1995) (Thomas, J., concurring) (finding that the original understanding of the First Amendment protects anonymous political speech) with *id.* at 1530-37 (Scalia, J., dissenting) (arguing that the original intent does not protect anonymous political speech).

¹⁰⁵ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134 (1977) (noting that "a strict interpretation of the text yield[s] a narrow view of constitutional rights, because it limits such rights to those recognized by a limited group of people at a fixed date of history"); Brennan, *supra* note 103, at 5 (observing that "[a] position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right," and contending that "[t]his is a choice no less political than any other . . . [It] turn[s] a blind eye to social progress and eschew[s] adaptation of overarching principles to changes of social circumstances"); cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 68-92 (1993) (arguing that the belief that judges act impartially when they adhere to the status quo in the interest of neutrality is misguided, because existing distributions of property rights and personal liberties are themselves products of law); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245-46 n.4 (1995). Tushnet stated that:

[N]early every constitutional theorist urges minimal judicial review and vigorous democratic dialogue on issues on which the theorist believes her preferred position is likely to prevail in the democratic dialogue and more-than-minimal review on issues on which the theorist believes her preferred position is unlikely to prevail there.

Id.

¹⁰⁶ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992); *Roe v. Wade*, 410 U.S. 113, 168 (1973) (Stewart, J., concurring); see also U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11-41 (1980); MARK N. GOODMAN, *THE NINTH AMENDMENT: HISTORY, INTERPRETATION, AND MEANING* 4-8 (1981) (reciting historical materials showing that the original understanding of those clauses in the Constitution limiting congressional power is that they were "inserted merely for greater caution"); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1100-01 (1990) (contending that "[t]he Ninth Amendment is . . . the only rule of construction in the Constitution. It tells judges, legislators, and other interpreters of the Constitution how *not* to 'construe' that document. . . . [It] affirmatively acts as a presumption in favor of generalizing at higher levels of abstraction") (footnotes omitted); cf. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (enumerating fundamental due process liberty interests); *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823) (No. 3230) (enumerating

rather than follows from law,¹⁰⁷ that the Framers themselves unanimously believed in the concept of "inalienable rights" derived from "natural law,"¹⁰⁸ that the law will lose its legitimacy if it fails to keep up with changes in social circumstances,¹⁰⁹ and that there may be times when the interests of justice

fundamental privileges and immunities "which belong, of right, to the citizens of all free governments").

¹⁰⁷ See *Washington v. Glucksberg*, 117 S. Ct. 2302, 2306 n.10 (1997) (Stevens, J., concurring), in which Justice Stevens asserts that law

is not the source of liberty, and surely not the exclusive source. "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations."

Id. (Stevens, J., concurring) (quoting *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting)). Cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰⁸ See *Virginia Ratifying Convention, 1788*, reprinted in 2 THE BILL OF RIGHTS, *supra* note 29, at 766, 840 (proposing the original draft of a "bill of rights" that provided in its enumerated guarantees "1st. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety"); Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent"*, 15 HARV. J.L. & PUB. POL'Y 965 (1992) (observing that "[o]riginalists cannot be positivists," *id.* at 1029, because *all* of those who helped shape our Constitution espoused a belief in the existence of inalienable human rights which were impossible to exhaustively enumerate and superior to positive law, *see id.* at 971-72); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) (documenting the history of the adoption of the Fourteenth Amendment, including the statements of Congressman John A. Bingham, author of Section 1, *see id.* at 42, who described the right not to be "deprived of life or liberty or property without due process of law" as "law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice . . . that justice which is the highest duty of nations . . .," *id.* at 36 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1865-1866)), and Senator Jacob M. Howard, who stated that the Constitution guaranteed "personal rights" that included those enumerated in the first eight amendments but which "are not and can not be fully defined in their entire extent and precise nature," and who contended that "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees," *id.* at 57-58 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865-1866))).

¹⁰⁹ See BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 10 (1928) (contending that "[w]e live in a world of change. If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow"); cf. *Casey*, 505 U.S. at 901, asserting that:

demand going beyond the safeguards expressed or even implied in the Constitution.¹¹⁰

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations . . . Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

Id.; *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954) (noting that, in evaluating the constitutionality of school segregation, "we cannot turn back the clock to 1868 when the Amendment was adopted"); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (contending that "[g]reat concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the [Founders] knew too well that only a stagnant society remains unchanged"); *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943) (asserting that "the majestic generalities of the Bill of Rights, conceived . . . [when] liberty was attainable through mere absence of governmental restraints," must be translated "into concrete restraints on officials dealing with the problems of the twentieth century"); see also Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 7 (1987) (suggesting that the inability of the Constitution to provide for all possible contingencies allows it to constrain courts only "in setting broad outer bounds to the exercise of judicial discretion rather than in prescribing the actual rules of decision," the result being that constitutional law "is a body of judge-made law, constrained by the constitutional text but not derived from it or prescribed by it in a substantial sense"); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 301 (1975) (contending that "the meaning of the Constitution's delphic phrases . . . does not inhere in the past alone; its locus is also in the present and future"). Compare U.S. CONST. preamble (stating that the Constitution was established to "secure the blessings of liberty to ourselves and our posterity") with *Virginia Declaration of Rights, 1776*, reprinted in 1 THE BILL OF RIGHTS, *supra* note 29, at 234, 236 ("That no free Government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.") (emphases added).

¹¹⁰ See, e.g., *Adamson v. California*, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting) (stating that "[o]ccasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation . . . despite the absence of a specific provision in the Bill of Rights"); Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 117 (1921) (observing that "[c]odification is, in the main, restatement," and that "a code, if completed, would not dispense [with] mediation between legislature and judges, for code is followed by commentary and commentary by revision, and thus the task is never done"); cf. William J. Brennan, Jr., *The Equality Principle in American Constitutional Jurisprudence*, 48 OHIO ST. L.J. 921, 923 (1987) (contending that "society . . . has come to believe that the lawyer and judge in America are uniquely situated to play a creative role in American social progress"). Compare *Frank v. Mangum*, 237 U.S. 309 (1915) (upholding conviction against appellant's due process and habeas corpus

2. Constitutional Privacy and Physician-Patient Privilege

While *theories* of constitutional construction tend toward polar extremes of either clause-bound interpretivism or justice-seeking noninterpretivism, the scope of the actual debate *in practice* is much narrower, but still potentially determinative for highly contentious issues. There is general consensus that the enigmatic Due Process clauses provide for unenumerated rights,¹¹¹ that

claims—despite domination of trial by a mob—because formal procedures were complied with by the trial judge) *with* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (striking down school segregation in District of Columbia via Fifth Amendment Due Process Clause despite absence of any equal protection guarantee in the Constitution pertaining to the federal government). Even interpretivists tend to accept some notions of interstitial “gap filling” derived from the subjective belief that applying the law as written would produce results that are absurd or clearly antithetical to justice. *See* ELY, *supra* note 106, at 50; *cf.* *Printz v. United States*, 117 S. Ct. 2365, 2370 (1997) (Scalia, J., opinion of Court) (“Because there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring) (explaining that the statute at issue would, if applied as written, produce an “absurd” result, thus the Court was justified in departing from the plain meaning of the rule’s text); *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (stating that a judge’s duty is “to ensure that the powers and freedoms the framers specified are made effective in today’s circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint”); *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Learned Hand, J., concurring) (asserting that “[t]here is no surer way to misread a document than to read it literally”), *aff’d sub nom.* *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945).

¹¹¹ *See, e.g.,* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) (“[T]he Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.”) (citations omitted); *id.* at 2268 (stating that this liberty interest has “never [been] fully clarified, to be sure, and perhaps [is] not capable of being fully clarified”); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (asserting that “fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined”). Professor Gormley has noted that, with regard to the right to privacy under the Fourth Amendment,

the entire Court—including the conservative wing—has displayed little difficulty in interpreting and applying unwritten principles in the Constitution. Nowhere is the word “privacy” mentioned in the Fourth Amendment. Nowhere does the Constitution speak of “reasonable expectations” of privacy, nor define how society in its collective wisdom is to arrive at a determination of “reasonableness” or “unreasonableness” in twentieth century America. Yet the Court has applied these concepts with no apparent difficulty, using the precise judicial tools—unspecified text, constitutional history, evolving case

tradition and precedent supply invaluable guidance in discerning these rights,¹¹² and that judges must use “judgment and restraint” in evaluating the constitutionality of individual rights claims.¹¹³ However, the Court has continued to struggle with the degree to which these rights must be “deeply rooted in this Nation’s history and tradition”¹¹⁴ for a right to be recognized, as well as the extent to which analogic reasoning may be applied to bring unforeseen circumstances within the orbit of a recognized right.

Despite the considerable degree of consensus, the differences in the interpretive theories expressed by recent majorities of the Court are significant enough that the *theory applied to interpreting the Constitution* could prove to be the determinative factor in evaluating whether physician-patient privilege is a right deserving of constitutional protection. In *Casey*, the Court relied upon Justice Harlan’s dissent in *Poe* as the appropriate formula for adjudicating substantive due process claims. The Court adopted Justice Harlan’s view that its responsibility was to apply “reasoned judgment” in determining whether a statute at issue constitutes an arbitrary imposition or purposeless restraint on a protected liberty.¹¹⁵ Although Justice Harlan’s understanding emphasized tradition, it also acknowledged that “tradition is a living thing,”¹¹⁶ and recognized on an equal footing with tradition the importance of a decision to

law, modern societal norms—which have generated so much controversy in other areas of privacy law, particularly in the abortion and fundamental-decision privacy cases.

Gormley, *supra* note 54, at 1372–73.

¹¹² See, e.g., *Casey*, 505 U.S. at 849–50 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

¹¹³ See *id.*; see also *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (contending that neither positivistic objectivity and political neutrality with substantive injustice, nor *ad hoc* pragmatic justice with uncertainty and judicial willfulness, “is entirely satisfactory,” and observing that “[i]t is no wonder that our legal system oscillates between the approaches”), *aff’d sub nom.* *Chapman v. United States*, 500 U.S. 453 (1991); *Stack v. New York N.H. & H.R. Co.*, 58 N.E. 686, 687 (Mass. 1900) (stating that, although “in a clear case it might be possible even to break away from a line of decisions . . . based on a deeper insight into the present wants of society,” the courts’ “general duty is not to change, but to work out, the principles already sanctioned by the practice of the past”); cf. Scalia, *supra* note 101, at 861–62, 864 (observing that “there is really no difference between the faint-hearted originalist and the moderate nonoriginalist”); BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 2 (1924) (observing that “[r]est and motion, unrelieved and unchecked, are equally destructive. The law . . . must find some path of compromise. . . . All depends on the wisdom with which the joinder is effected”).

¹¹⁴ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹¹⁵ See *Casey*, 505 U.S. at 847–50.

¹¹⁶ See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

break away from a tradition.¹¹⁷ Thus, although common law tradition does not recognize a physician-patient privilege,¹¹⁸ the decision by nearly every state to statutorily break away from this tradition,¹¹⁹ taken in concert with the effective negation of these state statutes that results from the absence of such a privilege in federal courts,¹²⁰ could render the admissibility of physician-patient communications in federal courts an impermissible, arbitrary imposition on the individual liberty interest in seeking medical treatment and consultation.¹²¹

In *Glucksberg*, however, the Court adopted a different standard for evaluating due process claims. Chief Justice Rehnquist's two-part test required, first, that an asserted right must be "deeply rooted in this Nation's history and tradition," and second, that there must be a "careful description" of the liberty interest—that is, the interest must be construed at a very narrow level of generality.¹²² Moreover, the Court explicitly rejected the applicability of a balancing test to evaluate inexplicit substantive due process claims.¹²³ Applying this theory, the Court's balancing test approach from *Whalen* would be inapplicable, and the Court's observation in *Whalen* that physician-patient confidentiality was not recognized at common law would dispositively foreclose the possibility of recognizing physician-patient confidentiality as a constitutionally protected right.¹²⁴

Clearly, there are certain interests arising within the physician-patient relationship that are so private, personal, and sensitive to disclosure that they may arguably be deemed compelling and thus deserving of protection as fundamental rights.¹²⁵ There are many more interests that would seem to at

¹¹⁷ See *id.*

¹¹⁸ See *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977).

¹¹⁹ See *supra* note 7.

¹²⁰ See *supra* notes 8–10 and accompanying text.

¹²¹ Cf. *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (recognizing "unanimous accord" among states as lending "convincing support to the conclusion we have reached as to the fundamental nature of that right"). It should be observed that, although this approach *could* support the recognition of physician-patient privilege as a constitutional right, it does not necessarily require such a result. Justice Souter, relying on Justice Harlan's formula in his *Glucksberg* concurrence, makes it clear that a sufficiently important state interest can potentially overcome both a break with tradition and the liberty interest it supports which the state seeks to infringe upon. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2290–93 (1997) (Souter, J., concurring).

¹²² See *Glucksberg*, 117 S. Ct. at 2268.

¹²³ See *id.*

¹²⁴ See *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977).

¹²⁵ For example, in determining the course and direction and quality of one's life, perhaps one of the most fundamental interests is the right to determine for oneself whether the individual should know about genetic predispositions for lethal syndromes, the specter of

least satisfy the balancing test articulated in *Whalen*.¹²⁶ However, given the Court's preference for avoiding deciding constitutional issues whenever possible,¹²⁷ it is unlikely that the Court will recognize a constitutionally based evidentiary privilege—not deeply rooted in tradition—that would bar potentially probative evidence from trial.¹²⁸ Moreover, because Rule 501 explicitly allows the federal courts to recognize privileges through the application of common law principles (thus raising no interpretivist-noninterpretivist debate issue) in light of reason and experience (thus eliminating the need to identify a relevant

which may haunt the individual for the remainder of his or her life. Compare CHARLES FRIED, *RIGHT AND WRONG* 146–47 (1978) (stating that “[w]hat a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty”) (emphasis added) with DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 298 (1995). Kevles notes that:

Many more genetic diseases can now be identified than can be cured or even treated. Someone with the gene for Huntington's disease might well prefer not to know it, since the knowledge that he or she will fall victim to it would mean having to live under a sentence of certain debilitation and doom.

Id.

¹²⁶ See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616–17 (1989) (finding that “chemical analysis of [a blood] sample to obtain physiological data [invades] privacy interests,” and that “chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic”).

¹²⁷ See, e.g., *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 157 (1984); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979).

¹²⁸ It should be observed that the costs to society of recognizing a constitutional right to privacy in the medical sphere could extend beyond the loss of evidence that is merely incidental or cumulative medical information in a civil or criminal suit. The problem is that the Court, upon acknowledging a previously unrecognized right, tends to initially establish a broad rule, the fine lines of which the Court will only later determine as it gains expertise in the area of law at issue. See, e.g., *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996) (declining to delineate the full contours of the newly discovered psychotherapist-patient privilege). As a result, the recognition of such a right may lead to its extension to unforeseen spheres through which it may promote problematic unintended consequences. Cf. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2293 (1997) (Souter, J., concurring) (stating that “[t]o recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions”); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring) (noting that the appropriate action of the Court was to act with restraint “in times when we know too little to risk the finality of precision”).

tradition recognizing the right), it would seem to be more appropriate for the Supreme Court or federal courts to determine—if indeed they choose to do so—the existence and scope of a physician-patient evidentiary privilege under Rule 501, rather than under the Constitution.

III. THE MEDICAL AND PSYCHOTHERAPY PRIVILEGES UNDER THE FEDERAL RULES OF EVIDENCE

A. *The Physician-Patient Privilege: Common Law and Statutory Development*

Traditionally, the common law has applied the maxim that “the public . . . has a right to every man’s evidence.”¹²⁹ Where privileges have been recognized by the courts, they have generally had to meet four criteria specified by Dean Wigmore:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.¹³⁰

Wigmore believed that the attorney-client,¹³¹ husband-wife,¹³² and clergy-communicant¹³³ relationships met this four-part test, but that the physician-patient relationship did not.¹³⁴ He noted that, in 1776, the British judge Lord Mansfield held that “a surgeon has no privilege, where it is a material question in a civil or criminal cause.”¹³⁵ In 1828, however, New York adopted a

¹²⁹ See *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2192 (3d ed. 1940)).

¹³⁰ See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton rev. ed. 1961).

¹³¹ See *id.* § 2291, at 549.

¹³² See *id.* § 2332, at 642.

¹³³ See *id.* § 2396, at 878.

¹³⁴ See *id.* § 2380a, at 530.

¹³⁵ See *id.* § 2380, at 818 (quoting *Dutchess of Kingston’s Trial*, 20 How. St. Tr. 355, 573 (1776), reprinted in NOTABLE BRITISH TRIALS SERIES (Melville ed., 1927)).

statutory privilege,¹³⁶ and by 1961, forty-one states had followed suit.¹³⁷ Wigmore condemned this statutory trend. Applying his own four-part test, he contended that the physician-patient privilege failed the first, second, and fourth parts, and thus should not be recognized.¹³⁸

Of course, Wigmore's distaste for the privilege was based on a very different world than the one we have today. Wigmore properly saw the privilege in his day primarily as a shield for practitioners of medical fraud and disputants of a will and saw little interest in giving these "incurables" the benefit of the law.¹³⁹ Although he did perceive the increasing trend toward

¹³⁶ See 2 N.Y. REV. STAT. 406, pt. 3, ch. 7, art. 9, § 73 (1828).

¹³⁷ See 8 WIGMORE, *supra* note 130, § 2380, at 819-27 n.5.

¹³⁸ First, he stated that "[i]n only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense." *Id.* § 2380a, at 829. Second, he added that "[e]ven where the disclosure is actually confidential, it would nonetheless be made though no privilege existed," thus the absence of such a privilege had no deterrent effect on the willingness of the patient to make the disclosure. *Id.* (observing that "[p]eople would not be deterred from seeking medical help because of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came?"). He conceded the third part of his test, admitting that "no one will deny" the desirability of fostering the physician-patient relationship, *id.*, § 2380a, at 830, but argued "emphatically" that the privilege also failed the fourth part, because "there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician." *Id.*

¹³⁹ See *id.*, § 2380a, at 831. Wigmore asserted that:

[T]he practical employment of the privilege has come to mean little but the suppression of the truth Ninety-nine per cent of the litigation in which the privilege is invoked consists of three classes of cases—actions on policies of life insurance where the deceased's misrepresentations of his health are involved, actions for corporeal injuries where the extent of the plaintiff's injury is at issue, and testamentary actions where the testator's mental capacity is disputed. In all of these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except as a tactical maneuver in litigation.

Id. Certainly, fraud and abuse in the medical field are as prevalent today as ever before, see generally Sharon L. Davies & Timothy Stoltzfus Jost, *Managed Care: Placebo or Wonder Drug for Health Care Fraud and Abuse?*, 31 GA. L. REV. 373 (1997), and obviously all privileges create the *potential* for abuse. The tobacco industry, for example, has apparently used the attorney-client and attorney-workproduct privileges as a shield to conceal its research into and longstanding knowledge of the health dangers of tobacco smoke and addictiveness of nicotine. See John Schwartz, *Tobacco Firms Shielded Data on Hazards; Florida Ruling Forces Release of Documents*, WASH. POST, Aug. 7, 1997, at A1; Milo Geyelin, *Liggett Settlement Puts Spotlight on Industry's Top Legal Group*, WALL ST. J., Mar. 24, 1997, at B5; *Nighline* (ABC television broadcast, Aug. 6, 1997); *id.* (May 28, 1997). Professor Stanton A. Glantz has received many of these confidential documents and has made them available

specialization, he could not have foreseen a world where patients would require the assistance of physicians as much in the interests of preventative care as with actual injuries, where every aspect about a person's life would be understood to have implications for that individual's health, where insurance companies would exert such a powerful role in society, and where medical records could be stored, processed, and transmitted instantaneously by computer. Had he foreseen these future developments of the medical profession in an age of global communications, limited personal relationships between doctor and patient, and strong incentives to induce the patient to voluntarily seek preventative care, he might have thought differently about the need for a physician-patient privilege.

One area of the doctor-patient relationship where the sensitive nature of such communications *has* long been recognized is in the psychotherapist-patient sphere. It is thus not surprising that there is a wealth of litigation over the reach of the privilege with regard to this particular relationship, and as medicine increasingly comes to resemble psychotherapy in terms of the sensitive nature of the physician-patient relationship,¹⁴⁰ the evolution of the law toward the recognition of a psychotherapist-patient privilege will become increasingly relevant to the broader physician-patient relationship.

online. See generally *Tobacco Control Archives* (visited July 20, 1997) <<http://www.library.ucsf.edu/tobacco.html>>; cf. U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) (finding that smoking kills more than 434,000 Americans each year).

¹⁴⁰ For instance, where an oncologist has to inform a patient that his tumor has metastasized and is inoperable, the physician must get to know the patient so as to minimize his pain and best understand and meet his physical, emotional (and perhaps spiritual) needs; similarly, where a family practitioner is asked by a young patient to give her a prescription for birth control pills, a physician should ideally be able to assess whether the patient is emotionally mature enough to become involved in a sexual relationship and counsel the patient accordingly. Even physicians responsible for reporting the results of blood or genetic testing should have some familiarity with and a personal sense of the patient because such testing, much like psychotherapy, may reveal deeply personal information about the individual that he or she may not consciously be aware of and perhaps would prefer not to know. Cf. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2288 (1997) (Souter, J., concurring) (stating that "the Court [has] recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient").

B. *The Movement Toward a Federal Psychotherapist-Patient Evidentiary Privilege*

Prior to the 1970s, few courts recognized a psychotherapist-patient privilege despite the sensitive nature of the psychotherapeutic relationship.¹⁴¹ This began to change in the 1950s, however, when commentators first started to look at the psychotherapeutic relationship in isolation from the general physician-patient relationship.¹⁴² A law review article in 1952, for instance, asserted that the psychotherapist-patient relationship is a unique relationship that, on its own merits, meets all four of Dean Wigmore's criteria for a privilege.¹⁴³ In 1970 the California Supreme Court held in *In re*

¹⁴¹ The first instance in the United States of a trial judge upholding a psychiatrist's claim of privilege independent of statutory support appears to have occurred in *Binder v. Ruvel*, Civil Docket No. 52C2535 (Cir. Ct. Cook Co., Ill., June 24, 1952) (Harry M. Fisher, J., presiding). See Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U. L. REV. 384, 385 (1952).

¹⁴² See, e.g., *Developments in the Law—Privileged Communications: IV. Medical and Counseling Privileges*, 98 HARV. L. REV. 1530, 1530 (1985) (citing David W. Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 731-35 (1957)).

¹⁴³ See Note, *supra* note 141, at 386-89. Since then, other commentators have made similar arguments largely analogous to the following: First, the psychotherapist-patient relationship requires an exceptionally high degree of trust. For a therapist to be able to help his or her patients, the patient must be able to freely disclose his or her most closely held thoughts and feelings. See Advisory Committee's Note for Proposed Rule of Evidence 504, reprinted in *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 242 (1973) [hereinafter *Advisory Committee's Note*] (finding that psychotherapists "not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely"); cf. MICHAEL KAHN, *BETWEEN THERAPIST AND CLIENT: THE NEW RELATIONSHIP* 3 (1991) (noting that "[t]he slightest breach of confidentiality can be magnified by the client into a major betrayal"); SIGMUND FREUD, *A GENERAL INTRODUCTION TO PSYCHOANALYSIS* 22 (Joan Riviere trans. 1952) (offering that "[t]he dialogue which constitutes the analysis will admit of no audience" because "these communications relate to all his most private thoughts and feelings, all that which as a socially independent person he must hide from others, all that which, being foreign to his own conception of himself, he tries to conceal even from himself"). This in turn requires the therapist to provide his or her patients with the assurance that their elicitations will remain confidential and privileged from public disclosure. Professor Ralph Slovenko has observed that, among therapists, there is "near unanimity of opinion" that "nothing about a patient should be divulged to third parties," ostensibly because, without such an assurance of absolute confidentiality for the patient, the therapist will not be able to obtain the patient's full participation, an essential element of successful treatment. Ralph Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375, 375 (1975); cf. *Advisory Committee's Note*, *supra*, at 143; Note, *supra* note 141, at 386-87. The value of psychotherapy to individuals in

*Lifschutz*¹⁴⁴ that the federal right to privacy protects some confidential communications in psychotherapy¹⁴⁵ under some circumstances.¹⁴⁶ Subsequently, when the proposed federal rules of evidence¹⁴⁷ were drafted, they included among a number of suggested new privileges¹⁴⁸ a provision

need of such help, and ultimately to the community, is beyond question. See Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 39 (1980) (noting that "[s]uccessful psychotherapy may reduce social problems such as juvenile delinquency, marital complications, and violent crime . . . [and] may also reduce the cost of caring for dependents of the mentally ill and increase the productivity of those with mental deficiencies or difficulties") (footnote omitted). Finally, there is support for the contention that the benefit to the cause of truth-seeking is outweighed by the detriment to society incurred as a result of the absence of such a privilege. See Ellen S. Soffin, Note, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 DUKE L.J. 1217, 1224-26 (1985) (contending that "the injury to the psychotherapist-patient relationship from disclosing confidential communications far outweighs the incremental benefit such communications can provide as courtroom evidence").

¹⁴⁴ 467 P.2d 557 (Cal. 1970).

¹⁴⁵ See *id.* at 567. Although California had previously adopted a statutory psychotherapist-patient privilege, the Court stated its belief

that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut*, the United States Supreme Court declared that various [constitutional] guarantees . . . create zones of privacy, and we believe that the confidentiality of the psychotherapeutic session falls within one such zone.

Id. See also *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976); *Hawaii Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028 (D. Hawaii 1979); *McKenna v. Fargo*, 451 F. Supp. 1355 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979); *Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977); *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973); *In re B*, 394 A.2d 419 (Pa. 1978); *Allred v. State*, 554 P.2d 411 (Alaska 1976). All of these cases acknowledge that psychotherapist-patient communications are protected to at least some extent under a right to privacy.

¹⁴⁶ See *Lifschutz*, 467 P.2d at 561-72 (limiting use of the privilege to the patient, because only the intimate details of his life were at issue, and not those of the therapist, and allowing the state to overcome that right where it could demonstrate a compelling interest, narrowly tailored).

¹⁴⁷ See Proposed Rules of Evidence and Advisory Committee's Notes, reprinted in *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 240-44 (1973) (Proposed Rules); see also Revised Draft of Proposed Rules of Evidence for United States Courts and Magistrates, 51 F.R.D. 315, 366-69 (1971) (Preliminary Draft of Proposed Rules).

¹⁴⁸ The proposed rules suggested specific privileges concerning required reports (Proposed Rule 502, 56 F.R.D. at 234-35), the lawyer-client relationship (Proposed Rule 503, *id.* at 235-40), the husband-wife relationship (Proposed Rule 505, *id.* at 244-47),

protecting confidential information revealed by a patient to his or her psychiatrist or psychologist from compulsory disclosure,¹⁴⁹ but pointedly did not suggest protecting communications within the broader physician-patient relationship.¹⁵⁰

When Congress adopted the final version of the new Federal Rules of Evidence, however, it rejected the many specifically enumerated privileges in the proposed rules in favor of a single rule authorizing federal courts to apply "reason and experience"¹⁵¹ in developing the right of privilege through "principles of the common law."¹⁵² The advisory committee notes explain that

communications to clergy (Proposed Rule 506, *id.* at 247-49), one's political vote (Proposed Rule 507, *id.* at 249), trade secrets (Proposed Rule 508, *id.* at 249-51), secrets of state and other official information (Proposed Rule 509, *id.* at 251-54), and identity of informer (Proposed Rule 510, *id.* at 255-58), as well as the psychotherapist-patient relationship (Proposed Rule 504, *id.* at 240-44).

¹⁴⁹ Proposed Rule of Evidence 504 would have provided that:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

Rule 504(b), Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1973).

¹⁵⁰ See Advisory Committee's Note, Proposed Rule 504, 56 F.R.D. at 242 (stating that "[t]he doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient. While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege").

¹⁵¹ The phrase is taken from Federal Rule of Criminal Procedure 26, which in turn adopted the term from the opinion of Justice Harlan F. Stone in *Wolfle v. United States*, 291 U.S. 7, 12 (1934). The roots of the phrase, however, extend back much further. See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON* 552, 559 (Merrill D. Peterson ed., 1975) ("Let us . . . avail ourselves of our *reason and experience* to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils.") (emphasis added).

¹⁵² The rule adopted by Congress provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law

"[i]t should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules,"¹⁵³ however, the recognition of such privileges "should be determined on a case-by-case basis."¹⁵⁴ The Supreme Court later held that Rule 501 directed federal courts to "continue the evolutionary development of testimonial privileges,"¹⁵⁵ and offered that a new privilege could be carved out by the courts when it "promotes sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice,"¹⁵⁶ thus suggesting a balancing test not dissimilar from the one discovered under the Constitution in *Whalen*, and rejecting the notion that the recognition of privileges should be fixed at any single point in time.¹⁵⁷

C. Jaffee v. Redmond: *The Recognition of a Psychotherapist-Patient Evidentiary Privilege*

By 1994 all fifty states and the District of Columbia had adopted laws recognizing a psychotherapist-patient privilege.¹⁵⁸ Despite this unanimity among state legislatures, however, the federal courts responsible for developing federal common law had become deeply divided on this issue, with the Second

supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

¹⁵³ *Id.*, Advisory Committee Notes.

¹⁵⁴ *Id.*

¹⁵⁵ *Trammel v. United States*, 445 U.S. 40, 47 (1980).

¹⁵⁶ *Id.* at 51.

¹⁵⁷ *Cf. CARDOZO*, *supra* note 113, at 19–20 (observing that "[e]xisting rules and principles can give us our present location, our bearings, our latitude and longitude. [But the] inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth"); *Warren & Brandeis*, *supra* note 20, at 193 (perceiving that "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society").

¹⁵⁸ *See Jaffee v. Redmond*, 116 S. Ct. 1923, 1929 & n.11 (1996) (observing that all fifty states and the District of Columbia have adopted a psychotherapist-patient privilege of some sort); *see also id.* at 1931 & n.17 (noting that forty-five states and the District of Columbia extend the privilege to communications with licensed clinical social workers as well as to communications with psychiatrists and psychologists).

and Sixth Circuits recognizing a psychotherapist-patient privilege,¹⁵⁹ while the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits rejected such a privilege as being inconsistent with those privileges previously recognized at common law.¹⁶⁰

1. Jaffee: *Facts and Procedural History*

On June 27, 1991, Mary Lu Redmond, then a police officer for the Village of Hoffman Estates, Illinois ("Hoffman Estates"), responded to a dispatcher's report of a fight in progress at the Grand Canyon Estates apartment complex.¹⁶¹ According to Redmond's testimony at trial, she saw two men run out of the door of the apartment, with the latter, Ricky Allen, Sr., brandishing a butcher knife and seemingly closing in on the former.¹⁶² After commanding Allen several times to drop the knife, and believing that he was about to stab the man he was chasing, Redmond shot and killed Allen.¹⁶³

Allen's family took issue with Redmond's description of events, however, contending that Allen was unarmed when he exited the apartment.¹⁶⁴ Allen's mother, Carrie Jaffee, filed suit on behalf of his estate against respondents Redmond and Hoffman Estates, alleging that Redmond had violated Allen's Fourth and Fourteenth Amendment rights by using excessive and unwarranted force, and seeking compensation for his wrongful death.¹⁶⁵

Through pretrial discovery, it was revealed that Redmond had participated in approximately fifty counseling sessions with Karen Beyer, a licensed clinical social worker (LCSW), commencing three to four days after the shooting and continuing for about six months.¹⁶⁶ Plaintiffs sought access to Beyer's notes for

¹⁵⁹ See *In re Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).

¹⁶⁰ See *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1989).

¹⁶¹ See *Jaffee v. Redmond*, 116 S. Ct. 1923, 1925 (1996); *Jaffee v. Redmond*, 51 F.3d 1346, 1348 (7th Cir. 1995).

¹⁶² See *Jaffee*, 116 S. Ct. at 1925; *Jaffee*, 51 F.3d at 1348-49.

¹⁶³ See *Jaffee*, 116 S. Ct. at 1925-26; *Jaffee*, 51 F.3d at 1349.

¹⁶⁴ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1349.

¹⁶⁵ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1348 (both noting that plaintiffs filed suit for damages under REV. STAT. § 1979, 42 U.S.C. § 1983 (for violating plaintiff-decedent's Fourth and Fourteenth Amendment constitutional rights) and Illinois Wrongful Death Act, ILL. COMP. STAT., ch. 740, § 180/0.01-2.2 (West 1994) (for causing plaintiff-decedent's wrongful death)).

¹⁶⁶ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1350.

use in cross-examining Redmond at trial.¹⁶⁷ Defendants refused to divulge the notes, and contended that they were protected from compulsory disclosure at either discovery or trial by a psychotherapist-patient privilege.¹⁶⁸ The district court instructed the jury to presume that the contents of the notes would have been unfavorable to defendants.¹⁶⁹ The jury returned a verdict for the plaintiffs for \$45,000 on the federal constitutional violation claim and \$500,000 on the state wrongful death claim.¹⁷⁰

The Court of Appeals for the Seventh Circuit, Circuit Judge John L. Coffey, reversed and remanded the case for a new trial.¹⁷¹ The court held that "reason and experience compel the recognition of a psychotherapist/patient privilege."¹⁷² However, it held that this privilege "requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests" in the particular case at issue.¹⁷³ The court applied the balancing test previously adopted by the Sixth Circuit¹⁷⁴ and held that because "[t]here were numerous eyewitnesses to the shooting . . . the plaintiffs' need for Officer Redmond's personal innermost thoughts about the shooting incident were cumulative at best. In contrast, Officer Redmond's privacy interests were, and are still, substantial."¹⁷⁵

2. Jaffee: *The United States Supreme Court*

The Supreme Court, per Justice Stevens, affirmed the court of appeals in holding that the content of the conversations between Redmond and Beyer during their counseling sessions was protected from compelled disclosure under

¹⁶⁷ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1350.

¹⁶⁸ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1350.

¹⁶⁹ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1350-52.

¹⁷⁰ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1352.

¹⁷¹ See *Jaffee*, 116 S. Ct. at 1926; *Jaffee*, 51 F.3d at 1355-58.

¹⁷² See *Jaffee*, 51 F.3d at 1355. The court observed the importance to a traumatized patient of being able to seek out professional counseling in an environment of trust. See *id.* It found that "[r]eason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id.* at 1355-56. It also noted the counseling patient's privacy interest. See *id.* at 1356-58.

¹⁷³ See *id.* at 1357.

¹⁷⁴ See *id.* at 1357-58 (quoting *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983), in stating that "we will determine the appropriate scope of the privilege 'by balancing the interests protected by shielding the evidence sought with those advanced by disclosure'").

¹⁷⁵ *Id.* at 1358.

Rule 501.¹⁷⁶ Although the Court acknowledged the time-honored maxim that the public has a right to every person's evidence,¹⁷⁷ it also noted that an exception to this rule was justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."¹⁷⁸ The Court held that the psychotherapist-patient privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."¹⁷⁹

The Court also observed that a balancing of competing interests strongly favored recognizing the privilege. First, it found that the benefit to the cause of justice that might result from denying the privilege was "modest" when compared with the harm that would result from the chilling effect that the denial of the privilege would have on confidential communications between individuals in need of therapy and their psychotherapists.¹⁸⁰ Second, it noted that all fifty states and the District of Columbia have recognized such a privilege,¹⁸¹ but that this would have little of its intended effect of promoting therapy if such a privilege was not likewise recognized in the federal courts.¹⁸² To fulfill this promise, the Court took the privilege a step further than the

¹⁷⁶ See *Jaffee*, 116 S. Ct. at 1927–32. On remand, a jury awarded the victim's estate \$100,000 in damages on the constitutional violation claim, but cleared Redmond on the wrongful death claim. See Michael Gillis, *\$100,000 Award in Shooting by Cop*, CHI. SUN-TIMES, Dec. 7, 1996, at 9.

¹⁷⁷ See *Jaffee*, 116 S. Ct. at 1928 (citing *United States v. Nixon*, 418 U.S. 683, 709 (1974); *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

¹⁷⁸ *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))).

¹⁷⁹ *Id.* at 1929. The Court observed that effective psychotherapy

depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. . . . By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Id. at 1928–29 (footnote omitted).

¹⁸⁰ See *id.* at 1929.

¹⁸¹ See *id.* at 1929 n.11.

¹⁸² See *id.* at 1929–30.

Seventh Circuit had previously gone by rejecting the notion that such a privilege should be contingent upon a trial judge's subsequent balancing of the patient's privacy interest against the evidentiary need for disclosure.¹⁸³

Further, the Court held that the privilege protecting confidential communications to psychotherapists should be extended to LCSWs as well as to licensed psychiatrists and psychologists because LCSWs perform largely the same counseling services as do psychiatrists and psychologists, and LCSWs often service a client base of much more modest means.¹⁸⁴

The Court left open for future consideration the delineation of the "full contours" of the privilege,¹⁸⁵ choosing not to render a decision that would "govern all conceivable future questions in this area."¹⁸⁶

Justice Scalia, writing in dissent, attacked the Court's recognition of the privilege because, he asserted, the price society will have to pay for encouraging psychotherapeutic counseling is that of occasional injustice,¹⁸⁷ and moreover, the evil of "making our federal courts occasional instruments of injustice."¹⁸⁸ Although he appeared more willing to accept, at least in theory,

¹⁸³ See *id.* at 1932 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), in observing that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all"); cf. Smith, *supra* note 143, at 48.

¹⁸⁴ See *Jaffee*, 116 S. Ct. at 1931-32. It is unclear whether it was the Court's intention to extend the privilege to Marriage, Family, and Child Counselors (MFCCs) as well as to LCSWs, but following the Court's logic, which seems to vest the privilege in the nature of the communication with the state-licensed professional rather than in the specific title of the professional's license, it would seem that MFCCs, too, are covered by this privilege. Like LCSWs, MFCCs service a broader segment of the population in terms of socio-economic status than do psychiatrists and psychologists, and in contrast to LCSWs, who are trained as clinicians in the context of managing a case, the professional scope and standard of practice of MFCCs much more closely parallel that of psychologists, to whom the privilege seems to be conceded even by Chief Justice Rehnquist (who joined Justice Antonin Scalia's dissent in *Jaffee* only in Part III, which criticized the Court's application of the privilege to patient communications with LCSWs).

¹⁸⁵ See *id.* at 1932.

¹⁸⁶ *Id.* at 1931 (quoting *Upjohn*, 449 U.S. at 386). The Court did not outline possible exceptions to the privilege it was recognizing, but did acknowledge in a footnote that "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist," thus adopting *sub silentio* the dangerous patient exception first recognized by the California Supreme Court in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976) (en banc). See *Jaffee*, 116 S. Ct. at 1932 n.19.

¹⁸⁷ See *id.* at 1932 (Scalia, J., dissenting).

¹⁸⁸ *Id.* at 1934 (Scalia, J., dissenting) (quipping that parents, siblings, best friends, and bar tenders have all historically served a function in society similar to that of the

the recognition of a privilege for licensed psychiatrists or psychologists,¹⁸⁹ he vehemently took issue throughout his dissent with the extension of the privilege to LCSWs.¹⁹⁰

IV. RULE 501 AND *JAFFEE*: IMPLICATIONS FOR THE RECOGNITION OF A GENERAL PHYSICIAN-PATIENT PRIVILEGE

A. *Applying the Rationale of Jaffee to the Proposed Physician-Patient Privilege*

At some point in the next few years, the United States Supreme Court will be asked to recognize a physician-patient privilege under Rule 501, in addition to the psychotherapist-patient,¹⁹¹ attorney-client,¹⁹² and spousal¹⁹³ privileges that the Court has already recognized. Applying common law principles in light of reason and experience in the same manner in which the Court applied them in *Jaffee*, the Court should extend Rule 501 to protect a patient's medical records and confidential communications with his or her physician from compulsory disclosure.

First, *reason* tells us that the physician-patient evidentiary privilege is a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."¹⁹⁴ The physical health and well-being of all Americans is certainly a public good, and the physician-patient relationship is one that promotes public health and well-being. However, the threat of compelled public disclosure of one's personal medical information is increasingly an important consideration that may serve to undermine this

psychotherapist, but do not enjoy an evidentiary privilege, and seemingly do not require one to continue to effectively fulfill this role).

¹⁸⁹ See *id.* at 1937 (Scalia, J., dissenting). Scalia noted that a

licensed psychiatrist or psychologist is an expert in psychotherapy—and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family or friends.

Id. (Scalia, J., dissenting).

¹⁹⁰ See *id.* at 1932–41 (Scalia, J., dissenting).

¹⁹¹ See *id.* at 1931–32.

¹⁹² See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹⁹³ See *Trammel v. United States*, 445 U.S. 40, 51–53 (1980).

¹⁹⁴ *Jaffee*, 116 S. Ct. at 1928 (quoting *Trammel*, 445 U.S. at 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))).

relationship.¹⁹⁵ Today, patient fears are justifiably greater in light of medical advancements in determining sensitive information about a patient from a patient's medical history, genetic code, and laboratory tests,¹⁹⁶ and are compounded by technological developments that allow medical providers to compile and disseminate this highly personal information with unprecedented speed and efficiency. HMOs and insurers in general have a tremendous incentive to obtain medical information suggesting that an individual presents or is likely in the future to present the risk of requiring costly health care, and employers who provide health insurance plans for their employees are vulnerable to pressure from insurers that wish to avoid providing services for such individuals. The depersonalization of the physician-patient relationship,¹⁹⁷ the formalization of medical records, the compilation of such records into computerized files, and especially the increasing interest that employers and insurance companies are taking in such information all serve to validate patient

¹⁹⁵ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 595 (1977) (noting that patients will sometimes decline treatment out of fear of public disclosure and misinterpretation of sensitive medical information).

¹⁹⁶ See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (noting that blood and urine tests can reveal extensive information about an individual's diet, health, neurological or physiological disorders, whether the individual is pregnant, and what drugs (legal or illegal) he or she is taking). Various other tools, such as positron-emission tomography (PET) scans, see, e.g., Benjamin V. Siegel et al., *Regional Cerebral Glucose Metabolism and Attention in Adults with a History of Childhood Autism*, 4 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 406, 406-14 (1992); Alan J. Zametkin et al., *Cerebral Glucose Metabolism in Adults with Hyperactivity of Childhood Onset*, 323 NEW ENG. J. MED. 1361, 1361-66 (1990), magnetic resonance imaging (MRI), see, e.g., Antonio R. Damasio, *Towards a Neuropathology of Emotion and Mood*, 386 NATURE 769 (1997); Wayne C. Drevets et al., *Subgenual Prefrontal Cortex Abnormalities in Mood Disorders*, 386 NATURE 824 (1997), and cognitive science techniques, see, e.g., Debra L. Long et al., *A Test of the On-Line Status of Goal-Related Inferences*, 31 J. MEMORY & LANGUAGE 634 (1992), can even reveal the way in which an individual thinks—how, when, at what rate, and where in one's brain the individual processes information.

¹⁹⁷ In sharp contrast to the enduring and often highly personal relationship that patients often established with a single "family physician" only a generation or two ago, it is now common for a patient belonging to an HMO plan to have only a very limited choice as to whom his or her regular physician will be. Further, patients are now routinely referred from one specialist to another and will rarely form more than the most superficial personal relationship beyond the professional scope of the association. This breakdown in physician-patient familiarity makes more formal safeguards protecting the confidentiality of the patient—including a privilege for confidential communications—even more important if the patient is going to be as forthright as he or she may need to be for the physician to appropriately diagnose an existing problem or recognize immediate or long-term health risks to the patient from the patient's symptoms, diet, activities, routine, or past consequential events.

concerns about medical information confidentiality.¹⁹⁸ Several recent studies, for instance, found that some six percent of 906 major American companies surveyed perform genetic testing, and over twenty-five percent of those who test "say they either won't hire or will fire a person who tests positive for certain genetic traits."¹⁹⁹ Especially in an age when preventative health care is becoming increasingly important, when every aspect of a person's life is now recognized as having significant bearing upon his or her health, it is incumbent upon society that it encourage frequent contact and full disclosure between physician and patient. It also makes little sense to discourage individuals from seeking health care at the time when their problems may be most treatable, and instead induce them to wait until the condition of concern is so serious that the threat of public disclosure is no longer an effective deterrent to the individual's interest in seeking professional care.

Second, *experience*, too, favors recognition of the privilege by the federal courts. Prior to the drafting of the proposed federal rules of evidence, the American Hospital Association included a right to confidentiality in its "Patient's Bill of Rights."²⁰⁰ Today, the physician-patient evidentiary privilege

¹⁹⁸ It should be emphasized that such testing already goes on today, often without the patient's knowledge or consent. See, e.g., Dana Hawkins, *A Bloody Mess at One Federal Lab: Officials May Have Secretly Checked Staff for Syphilis, Pregnancy, and Sickle Cell*, U.S. NEWS & WORLD REP., June 23, 1997, at 26 (reporting on secret testing program at University of California's Lawrence Berkeley National Laboratory).

¹⁹⁹ *CBS Evening News* (CBS television broadcast, June 22, 1997), transcript available in 1997 WL 5613959. Another survey of human resources employees at 84 Fortune 500 companies found that one-third of the employees admitted having used medical or insurance records in making decisions concerning hirings, promotions, or firings. See Steven Findlay, *Administration Today Offers Plan to Ensure Confidentiality*, USA TODAY, Sept. 11, 1997, at A1. A *Time* magazine article noted an instance in which a banker serving on a state health commission obtained a list of cancer patients and subsequently revoked the loans of individuals whose names appeared on the list. See Joshua Quittner, *Invasion of Privacy*, TIME, Aug. 25, 1997, at 28, 31.

²⁰⁰ See American Hospital Association, *A Patient's Bill of Rights*, reprinted in AMITAI ETZIONI, GENETIC FIX 212 (1973) (suggesting that "[t]he patient has the right to every consideration of his privacy concerning his own medical care program The patient has the right to expect that all communications and records pertaining to his care should be treated as confidential"). Such protections, however, provide no real protections of patient confidentiality. Consider, for example, a recently observed "Patient Bill of Rights" which informed patients that "YOU ARE ENTITLED privacy concerning your medical care, including examinations, consultations and discussions of your case. Facts and information about consultation, examination, and treatment are considered confidential. Unless permitted by law, no information or records pertaining to your care will be released without your written permission." Patient Bill of Rights, posted in Kaiser Permanente Medical Center, Walnut Creek, Calif. (observed May 14, 1997) (emphasis added).

is recognized by statute in a majority of states and the District of Columbia.²⁰¹ Most of these state statutes are based on the American Law Institute's Uniform Rule of Evidence 503 ("Uniform Rule 503"), a rule drafted in 1974 in response to United States Supreme Court Standard 504 (Standard 504).²⁰² Unlike

²⁰¹ See *supra* note 7.

²⁰² Uniform Rule 503 provides as follows:

Rule 503—Physician and Psychotherapist-Patient Privilege

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably believed necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of court.* If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to a communication relevant to an issue of the physical, mental[] or emotional condition of the patient in any proceeding in which he relies upon the condition as an

Standard 504, which applies only to psychotherapists, Uniform Rule 503 concerns both psychotherapists and physicians alike, and was designed to protect the patient from the compulsory disclosure of confidential communications not intended to be disclosed to third parties (except for those present to further the interests of the patient) in the consultation, examination, or treatment of the disorder.²⁰³ Consequently, as with the psychotherapist-patient privilege prior to *Jaffee*, the reluctance of the federal courts to recognize this privilege serves to undermine the promise made by the overwhelming majority of states.

Thus, applying Rule 501 as interpreted by the Supreme Court in *Jaffee*, reason and experience both support the recognition of a physician-patient privilege in federal courts.²⁰⁴

B. *Scope of the Proposed Privilege*

1. *Exceptions to the Privilege*

As with the psychotherapist-patient privilege recognized in *Jaffee*, a physician-patient privilege would necessarily have to encompass some exceptions.²⁰⁵ Reason and experience suggest that the exceptions already recognized by the states are an appropriate starting point for providing guidance for the federal courts. There have been a number of exceptions specified under the various state statutes establishing physician-patient privileges. Uniform Rule 503, which has served as a model for many of the state statutes, provides for exceptions where the communications in question are relevant to proceedings for hospitalization,²⁰⁶ where they result from an examination ordered by the court,²⁰⁷ or where they are relevant to an issue relied upon by the patient as an element of his or her claim or defense.²⁰⁸ Other statutory exceptions apply to

element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

UNIF. R. EVID. 503, reprinted in 2 WEINSTEIN & BERGER, *supra* note 9, § 504[08], at 504-36-37.

²⁰³ See *id.*

²⁰⁴ Cf. *Jaffee*, 116 S. Ct. at 1929.

²⁰⁵ Upon recognizing that Rule 501 includes a physician-patient privilege, the Supreme Court would presumably acknowledge that some exceptions as a general rule should exist, and otherwise leave to the lower federal courts the task of determining, on a case-by-case basis, where such exceptions should be drawn. See *id.* at 1932 & n.19.

²⁰⁶ See UNIF. R. EVID. 503(d)(1).

²⁰⁷ See *id.* 503(d)(2).

²⁰⁸ See *id.* 503(d)(3).

communications where the information relates to an attempt to procure illegal drugs,²⁰⁹ where the information relates to child abuse,²¹⁰ where it is needed for a disciplinary investigation of a physician,²¹¹ where the disclosure relates directly to the facts or immediate circumstances of an alleged homicide,²¹² where the individual is being tested for intoxication or blood alcohol concentration,²¹³ and where the communications relate to a paternity proceeding.²¹⁴ Additional exceptions, too numerous to list here, have been carved out by the various state courts. This Note will not attempt here to delineate those interests that are deserving of protection or those where society's interests should predominate. However, although some exceptions are clearly necessary, it is likewise true that if the courts recognize too many exceptions, they will effectively undermine (if not wholly eviscerate) the privilege's fundamental promise of granting the individual a sphere of personal liberty with respect to an especially personal and private aspect of his or her

²⁰⁹ See, e.g., ALASKA STAT. § 11.71.360 (1996); ARIZ. REV. STAT. ANN. § 13-3407(C) (Supp. 1996); ARK. STAT. ANN. § 82-1017(2) (1976); D.C. CODE ANN. § 33-566 (1981). This particular exception could have considerable ramifications for doctors who prescribe or recommend marijuana for seriously or terminally ill patients. In response to the success of voter initiatives in California (Proposition 215) and Arizona (Proposition 200, subsequently overturned by the state legislature) supporting the legalization of marijuana for medicinal purposes, Attorney General Janet Reno and other members of the Clinton administration have proposed targeting physicians and patients who violate federal drug enforcement laws. Compare *Government Vows to Punish Doctors Who Prescribe Pot*, ORLANDO SENTINEL, Dec. 31, 1996, at A5, available in 1996 WL 12437035 (reporting that federal law enforcement authorities intend to enforce federal drug laws against physicians who prescribe marijuana and patients who use it) with Jerome P. Kassirer, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366, 366 (1997) (contending that "a federal policy that prohibits physicians from alleviating suffering by prescribing marijuana for seriously ill patients is misguided, heavy-handed, and inhumane" because the long-term side effects and risk of addiction associated with marijuana are irrelevant to such patients, and deeming it hypocritical for the government to ban marijuana when potentially lethal drugs such as morphine and meperidine (Demerol) can be prescribed legally). In the absence of a clear exception, a physician-patient privilege could conceivably be used (by the patient directly, or by the physician on the patient's behalf) to prevent discovery of confidential communications between the patient and physician concerning the usefulness and means of procurement of marijuana.

²¹⁰ See, e.g., ALASKA STAT. § 47.17.060 (1996); ARIZ. REV. STAT. ANN. § 13-3620 (1996); IND. CODE ANN. § 31-6-11-8 (Burns Supp. 1990); WASH. REV. CODE ANN. § 5.60.060 (1997); WIS. STAT. ANN. § 905.04(4)(e) (1993).

²¹¹ See, e.g., N.H. REV. STAT. ANN. § 329:26 (Supp. 1996); TEX. R. EVID. 509(d)(5).

²¹² See, e.g., CAL. EVID. CODE §§ 998-99; WIS. STAT. ANN. § 905.04(4)(d) (1993).

²¹³ See WIS. STAT. ANN. § 905.04(4)(f) (1993).

²¹⁴ See *id.* at § 905.04(4)(g).

life. Thus, if the federal courts do recognize a physician-patient privilege, they should begin from the presumption that physician-patient communications are privileged, and thereafter carefully distinguish on a case-by-case basis those interests in which the state or an opposing party has a strong or compelling interest in obtaining the disclosure, taking into consideration the conflicting requirements of justice and privacy, state experiences with the various privileges and exceptions, and, where applicable, consensus among the states that such an exception should be recognized.

2. *The Privilege as Applied to Compelled Disclosure of Medical Records*

Although Wigmore opposed the recognition of a physician-patient privilege, he acknowledged its applicability to medical records where a general privilege had been created by state statute.²¹⁵ Nevertheless, information contained in an individual's medical records has traditionally played a crucial role in helping judges and juries make determinations of guilt and damages in criminal and civil suits. Today, while only a few of the state statutes establishing physician-patient privileges explicitly protect medical records from compelled disclosure,²¹⁶ many state courts have found that such records are protected by the privilege.²¹⁷ A few federal court decisions have also recognized a privilege for medical records.²¹⁸ However, many of these

²¹⁵ See 8 WIGMORE, *supra* note 130, § 2382, at 839.

²¹⁶ See TEX. R. EVID. 509(b)(2) (establishing that "[r]ecords of the identity, diagnosis, evaluation or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed"); WIS. STAT. ANN. § 905.04(2) (1993) (establishing that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition") (emphasis added).

²¹⁷ See, e.g., *State v. Walker*, 376 So.2d 92, 94 (La. 1979) (holding that a physician may not disclose the patient's diagnosis without the latter's "express consent"); *State v. O'Neill*, 545 P.2d 97, 104 (Or. 1976) (extending privilege to physician's entries in hospital records); *Heinemann v. Mitchell*, 220 N.E.2d 616, 617 (Ohio 1966) (finding that hospital records that contain confidential communications are privileged). But see *Chidester v. Needles*, 353 N.W.2d 849, 853-54 (Iowa 1984) (finding that confidential communication privilege does not pertain to office records containing confidential communications sought pursuant to subpoena filed by county attorney).

²¹⁸ The United States Court of Appeals for the Seventh Circuit has explicitly applied a balancing test "weigh[ing] the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case," *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061-62 (7th Cir. 1981) (quoting

privileges serve a primarily symbolic, rather than practical, purpose in their effect as implemented. In civil suits, for instance, judges or juries awarding damages based on life or work expectancy have traditionally taken into consideration previously diagnosed diseases (including cancer, heart disease, and other life-threatening illnesses) and factors that tend to predict premature mortality (such as the use of drugs, alcohol, or cigarettes) in determining the amount of the award.²¹⁹ Blood and urine tests for alcohol or illegal drugs have likewise consistently been admitted.²²⁰ Many states have recognized specific exceptions for HIV or substance abuse treatment records, but the underlying rationale for these exceptions has been a general interest in protecting public health rather than the individual interest in protecting confidentiality.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 543 (7th Cir. 1977)), and has argued that "[a] strong policy of comity between the state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy" because "where a 'state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.'" *Id.* at 1061 (quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1977) and *Lora v. Board of Educ.*, 74 F.R.D. 565, 576 (E.D.N.Y. 1977)). *See also* *Lukaszewicz v. Ortho Pharm. Corp.*, 90 F.R.D. 708 (E.D. Wis. 1981) (extending the state physician-patient privilege to the medical records of a patient's family pursuant to Rule 501).

²¹⁹ *See* Mark A. Rothstein, *Preventing the Discovery of Plaintiff Genetic Profiles by Defendants Seeking to Limit Damages in Personal Injury Litigation*, 71 IND. L.J. 877, 885-86 (1996).

²²⁰ *See* *State v. Kavlich*, 515 N.E.2d 652, 656 (Ohio App. 1986) (applying balancing test in declining to apply physician-patient privilege to results of blood-alcohol level test administered by defendant's physician in DUI prosecution); *see also* *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2392 (1995) (holding that the Fourth Amendment does not prohibit a school district from randomly drug testing its athletes); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990) (noting the state's considerable interest in eradicating drunk driving in permitting the use of police alcohol checkpoints); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding government program of conducting warrantless, suspicionless drug testing of United States Customs employees in certain sensitive positions); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (permitting government's use of mandatory blood and urine tests of employees, citing its compelling interest in railroad safety); *id.* at 628 ("[L]ogic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information."); *Schmerber v. California*, 384 U.S. 757, 764-65 (1966) (holding privilege against self-incrimination inapplicable to blood sample testing); *Hill v. NCAA*, 865 P.2d 633, 669 (Cal. 1994) (upholding NCAA drug testing program for collegiate athletes despite recognized right to privacy in California); *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 81 (W. Va. 1994) (holding permissible the results of blood tests performed on the defendant by treating physician). *But see* *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997) (holding unconstitutional a drug testing requirement for candidates for political office).

Consequently, where the evidentiary need is likewise presented as being in the public interest, these exceptions are frequently overcome with little difficulty.²²¹ Perhaps the only medical privilege that has had the practical effect of preserving patient privacy is the Public Health Service Act,²²² which protects research subjects engaged in “biomedical, behavioral, clinical, or other research . . . including research on mental health,” and specifically refers to the privacy of the individual research subjects as the interest deserving protection.²²³

With regard specifically to medical records and genetic information—“communications” within the physician-patient relationship that are especially sensitive to damaging disclosure—this Note proposes as a general rule that the compulsory disclosure of such information under the auspices of a federal court should be limited to those circumstances where it is essential for the purposes of establishing the identification of the suspected criminal wrongdoer or alleged tortfeasor as the culpable party. Even then, the information an opposing party may discover and disclose should be strictly limited to only that information that is necessary to prove the identification of the defendant and his or her association with the crime scene or unlawful event, and should exclude information associated with genetically-inherited diseases whenever possible. Moreover, the privilege should be based as much on protecting the patient’s interest in personal privacy as it is on a general societal interest. Information of merely cumulative or tangential value should not be brought into public consciousness unless the individual patient has somehow waived his or her right to confidentiality over the information in question, for instance, where the information relates directly to a claim or defense of the patient.

3. *The Privilege as Applied to Genetic Testing*

One subcategory of medical information—information derived from genetic testing—is so sensitive and personal that it should be privileged from compelled disclosure in all but the most exceptional cases or compelling circumstances. Because this information may be crucial to the plaintiff’s or state’s case against an individual, and due to the fact that the disclosure of such information in a public record may expose an individual to social sanction and create difficulties

²²¹ See Rothstein, *supra* note 219, at 902–04; see also Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 10 n.26 (1991); cf. *Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133, 1140 (3d Cir. 1995).

²²² 42 U.S.C. § 241(d) (1994).

²²³ See *id.*

in obtaining health insurance,²²⁴ this subcategory is perhaps the most important, complex, and controversial application of the proposed federal physician-patient privilege.

The issue of whether to allow expert testimony regarding DNA evidence has been litigated extensively, with most federal and state courts now recognizing the validity of DNA evidence.²²⁵ However, no federal court has yet addressed the issue of whether reason and experience support the recognition of a privilege for DNA evidence under Rule 501.²²⁶ This is surprising because, especially in light of the progress being made by the ongoing Human Genome Project, genetic information is already capable of revealing some of the most sensitive and private information there is to know about an individual, including predispositions for physical and psychiatric disorders that may result in premature disability or even death.²²⁷ The potential

²²⁴ See Geoffrey Cowley, *Flunk the Gene Test and Lose Your Insurance*, NEWSWEEK, Dec. 23, 1996, at 48 (speculating on the potential for genetic testing to create a "biological underclass"—a population of people whose genes brand them as poor risks for employment, insurance, even marriage"); see also Mark A. Rothstein, *The Use of Genetic Information for Nonmedical Purposes*, 9 J.L. & HEALTH 109 (1994-1995); Mark A. Rothstein, *Discrimination Based on Genetic Information*, 33 JURIMETRICS J. 13 (1992); Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J. L. & MED. 109 (1991); Mark A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379 (1983).

²²⁵ See, e.g., *United States v. Black Cloud*, 101 F.3d 1258 (8th Cir. 1996) (finding that DNA evidence met the criteria for admissibility under Federal Rule of Evidence 702 as established in *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993)); *Commonwealth v. Crews*, 640 A.2d 395 (Pa. 1994) (finding that the random match probability statistics offered by the prosecution's expert witness were not generally accepted by the scientific community, but that a "more likely than not" characterization of a DNA match was accepted); see also *United States v. Jakobetz*, 955 F.2d 786, 794, 796 (2d Cir. 1992) (citing *United States v. Williams*, 583 F.2d 1194, 1198-99 (2d Cir. 1978), in finding that DNA evidence met the relevancy standard set by Federal Rule of Evidence 403, requiring the probative value to substantially outweigh the prejudicial, confusing, or misleading effect, or cumulative nature, of the evidence; and that it met the standards of Federal Rules of Evidence 702 and 401 as well); *United States v. Two Bulls*, 918 F.2d 56 (8th Cir. 1990) (finding that DNA evidence was neither speculative nor conjectural, and thus met both the expert opinion standard of Rule 702 and the "general acceptance" standard recognized (prior to *Daubert*) in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)); cf. CARL SAGAN, *COSMOS* 35 (1980) (observing that the number of useful DNA sequences is "probably far greater than the number of electrons and protons in the universe").

²²⁶ Search of WESTLAW, ALLFEDS Database (Jan. 29, 1997).

²²⁷ As of July 1995, 1116 disease-related genes had been identified, including genes for cystic fibrosis, Duchenne muscular dystrophy, fragile X syndrome, hemochromatosis, hemophilia A, Lesch-Nyhan syndrome, neurofibromatosis-type 1, retinoblastoma, and cancers of the breast, colon, ovaries, and prostate. See Rothstein, *supra* note 219, at 880-81.

for such information to be exploited or misused by insurance companies is enormous.²²⁸ Nor is this danger limited to insurance companies. Defendants in personal injury cases may seek to discover such information so as to limit special damages based on lost future earnings.²²⁹ Although this approach would be consistent with the notion that such damages should accurately reflect lost future income, it also implicitly endorses the notion that society places a lesser value on those individuals with certain genetic makeups—a dangerous step toward eugenics.²³⁰ Even more ominous still is the possibility that a criminal prosecutor may some day use the defendant's possession of a gene statistically associated with a propensity towards violence or even mere social nonconformity to create a presumption in the jury's mind that the defendant is

The gene p53, in particular, has been associated with some sixty percent of all cancers. See Sharon Begley, *The Cancer Killer*, NEWSWEEK, Dec. 23, 1996, at 42-47; see also Stephen Aaron Silver, Attention Deficit Hyperactivity Disorder and Asperger's Syndrome: Extremes on an Attention-Stimulation-Integration Continuum Determined by Cognitive Structure 41-42, 89-93, 113 (1996) (unpublished M.A. thesis, John F. Kennedy University) (on file with author) (noting studies suggesting a genetic cause for fragile X syndrome, attention deficit hyperactivity disorder (ADHD), autism, and Asperger's syndrome); Rothstein, *supra*, at 881 & nn.29-30 (noting that progress is being made in identifying genes related to heart disease, diabetes, asthma, rheumatoid arthritis, schizophrenia, ADHD, and even bedwetting).

²²⁸ The incentive for HMOs and other insurance companies to use genetic testing to curtail their rapidly escalating costs is clear. Genetic disorders occur in approximately three to five percent of all live births in the United States and Britain, and chromosomal disorders like Down's syndrome occur in an additional one-half percent. See KEVLES, *supra* note 125, at 291. About twenty to thirty percent of all pediatric hospital admissions, and twelve percent of all adult hospital admissions, are attributable to genetic-based or chromosomal-based illnesses. See *id.* About fifteen percent of all diagnoses for mental retardation are reported as being "unambiguously hereditary." See *id.*; cf. Cowley, *supra* note 224, at 48 (reporting that an entire family of six had their insurance cancelled when one member of the family was found to have fragile X syndrome and speculating on the potential for genetic testing to create a "biological underclass"); Rothstein, *supra* note 219, at 881-82 (stating that it may soon be cost-effective for a defendant to test an asymptomatic plaintiff for such already-identified debilitating or deadly diseases as acute intermittent porphyria, adult polycystic kidney disease type-1, amyotrophic lateral sclerosis, early-onset Alzheimer's disease, familial nephritis, Huntington's disease, Kennedy's disease, Marfan syndrome, myotonic dystrophy, hereditary hemorrhagic telangiectasia, and Wilson's disease); Christine R. Kovach, *Alzheimer's Disease: Long-Term Care Issues*, 12 ISSUES IN L. & MED. 47, 48 (1996) (reporting a 1992 estimate that the cost of providing home care for dementia patients (including Alzheimer's disease patients) is \$25,259 per patient per year).

²²⁹ See Rothstein, *supra* note 219, at 884-87. See generally Mark A. Rothstein, *Should Genetic Information Be Used to Predict Life Expectancy of Plaintiffs in Tort Cases?*, 34 HOUS. LAW. 49 (Sept.-Oct. 1996).

²³⁰ Cf. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (stating that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon a doctrine of equality").

guilty.²³¹ Such information can be manipulated far too easily by irresponsible prosecutors, employers, or insurance companies to "legitimize" attitudes or policies of intolerance.²³² Genetic tests can already be used to target specific racial, ethnic, or religious groups associated with certain heritable traits,²³³ and

²³¹ See Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 331 (1992) (warning that "[i]f it is accepted that genetic endowment determines the propensity to commit bad acts, then hereditary traits, which often reduce to ethnic group membership, may one day be considered evidence of the commission of a crime"). Genetics may also influence the sentencing of an individual once convicted. One fear is that

[c]ourts may regard an individual whom science deems "at risk" as deserving differential treatment even before it is known whether the risk will materialize . . . [P]eople diagnosed as predisposed to hereditary disease may find themselves treated as if they were carriers of disorders certain to achieve expression, even when the relationship between genetic defects and their manifestations in behavior or disease is conditional.

Id. at 342. Cf. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding state eugenics law because "[t]hree generations of imbeciles are enough"). The law approved in *Buck* remained in effect until 1972. Several European countries, including Sweden and France, actively administered eugenics programs until as recently as the mid-to-late 1970s and 1980s. See *Nightline: The Secret Shame* (ABC television broadcast, Sept. 16, 1997); see also Editorial, *Crimes Against Genetics*, 11 NAT. GENET. 223, 224 (1995) ("[T]he public . . . sees scientific information, regardless of the soundness of the methods, as powerfully legitimizing, and, furthermore, the public's perception of genetic findings is that they are immutable. Thus the mere perception of reality . . . can provide impetus for the enactment of inequitable laws."). There is a tremendous danger in attempting to use genetic or other biological characteristics diagnostically based on a mere correlation with abnormal behavior, because such characteristics need not always result in proscribed behavior and may even be associated with normal or even exceptionally creative or productive personalities. Cf. DEAN KEITH SIMONTON, *GREATNESS: WHO MAKES HISTORY AND WHY* 284-311 (1994) (suggesting a link between psychopathology and eminence); Silver, *supra* note 227, at 59-71, 133-36 (suggesting that ADHD may facilitate creative thought and that Asperger's syndrome may likewise aid analytical thought); *Dateline NBC: Natural Born Killers* (NBC television broadcast, July 20, 1997), transcript available in 1997 WL 7755158 (interview with Professor Adrian Raine).

²³² See, e.g., Stephen Jay Gould, *Mismeasure by Any Measure*, in *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS* 3, 7 (Russell Jacoby & Naomi Glauberman eds., 1995) (criticizing a study purporting to show racial differences in heritable intelligence because the authors "violate fairness by converting a complex case that can yield only agnosticism into a biased brief for permanent and heritable difference").

²³³ It should be observed that there is so much genetic variation within racial, ethnic, and national populations that, even where statistical sampling reveals significant genetic distributional characteristics (such as ABO, Rh, and HLA allele frequencies) that distinguish a population from other identifiable groups, see generally L.L. CAVALLI-SFORZA ET AL., *THE HISTORY AND GEOGRAPHY OF HUMAN GENES* (1994); Gregory Livshits et al., *Genetic*

may soon be able to identify other groups as well.²³⁴ For some individuals, the very threat of having such information publicly disclosed may prove tantamount to extortion because the mere discovery of the information may cast a shadow over the remainder of the patient's life, for instance, by making it impossible for the individual to obtain health insurance.²³⁵ Thus, reason and experience justify an evidentiary privilege for DNA, at least where the state or party

Affinities of Jewish Populations, 49 AM. J. HUM. GENET. 131 (1991), these distributional trends do not support the identification of *individuals* with any particular population. Nevertheless, some specific genetic mutations are, as a result of natural selection or genetic drift, disproportionately represented in certain populations. For example, the incidence of sickle-cell anemia is disproportionately high among individuals of African descent, thalassemia in persons of Southeast Asian and Philippino (α -type) and Greek, Italian, and Asian (β -type) descent, Tay-Sachs disease in Ashkenazi Jews and French Canadians, and idiopathic torsion dystonia, Gaucher disease, and the BRCA1 breast cancer gene in Ashkenazi Jews. See generally SICKLE CELL DISEASE: BASIC PRINCIPLES AND CLINICAL PRACTICE (Stephen H. Embury et al. eds., 1994); GENETIC DISEASES AMONG ASHKENAZI JEWS (Richard M. Goodman & Arno G. Motulsky eds., 1979); Josie Glausiusz, *Unfortunate Drift*, 16 DISCOVER 34 (1995); Arno G. Motulsky, *Jewish Diseases and Origins*, 9 NAT. GENET. 99 (1995); Jeffery P. Struwing et al., *The Carrier Frequency of the BRCA1 185delAG Mutation is Approximately 1 Percent in Ashkenazi Jewish Individuals*, 11 NAT. GENET. 198 (1995); Yuet Wai Kan, *Development of DNA Analysis for Human Diseases: Sickle Cell Anemia and Thalassemia as a Paradigm*, 267 JAMA 1532, 1532 (1992); Brian W. Jack & Larry Culpepper, Commentary, *Preconception Care: Risk Reduction and Health Promotion in Preparation for Pregnancy*, 264 JAMA 1147, 1149 (1990). Furthermore, there are certain mutations that are found especially frequently and almost exclusively within particular populations. For instance, distinct ethno-specific nucleotide changes characterize the most prevalent BRCA1 and BRCA2 mutations found within each of the respective Russian, Jewish, Italian, Franco-British, Dutch, Swedish, African-American/African-French, Japanese, Finnish, and Icelandic populations. See Csilla I. Szabo & Mary-Claire King, *Population Genetics of BRCA1 and BRCA2*, 60 AM. J. HUM. GENET. 1013 (1997). The testing for these and other genes associated with certain ethnic, ethno-religious, or otherwise identifiable groups could thus be used as a "facially neutral" shield for an underlying policy of otherwise impermissible discrimination, thereby giving it a veneer of legitimacy. See KEVLES, *supra* note 125, at 299 (noting the danger that "the definition of 'defect' might become once again a hereditary cloak for social prejudice"). Even within groups there exists the threat of using genetics as a "legitimacy test." A recent article in the *New York Times* reporting that many cohanim—Jews of patrilinear priestly descent—share distinctive genetic markers also noted the danger that such information could be used by religious extremists for exclusionary purposes. See Denise Grady, *Genetic Traces Are Found to Link Descendants of Jewish Priesthood*, N.Y. TIMES, Jan. 7, 1997, at B12.

²³⁴ For example, sexual orientation, see Rothstein, *supra* note 219, at 881 n.30, propensity for obesity, see Michael Rosenbaum et al., *Medical Progress: Obesity*, 337 NEW ENG. J. MED. 396, 401–02 (1997), and predisposition for addiction or addictive behavior, see Nora D. Volkow et al., *Decreased Striatal Dopaminergic Responsiveness in Detoxified Cocaine-Dependent Species*, 386 NATURE 830 (1997), may all be genetically based.

²³⁵ See *supra* notes 125, 224, 228.

seeking the disclosure cannot show a serious or compelling interest in the information and where the information to be disclosed cannot be limited to the minimum amount of information necessary to match a suspected felon or tortfeasor to the criminal or tortious event. Rules of evidence exist to facilitate the accurate determination of facts in controversy; they do not provide parties with an open forum in which to disclose whatever information a party contends will support its cause—especially where the information is merely cumulative in effect and potentially oppressive to one of the parties.

The recently enacted Kennedy-Kassebaum Bill,²³⁶ which was intended primarily to make health insurance more accessible to individuals who lose their jobs or have pre-existing medical conditions, may in fact pose a further threat to the medical privacy of individuals. To “improve . . . the efficiency and effectiveness of the health care system”—for example, by improving health care for individuals who are away from their regular hospitals or doctors—it will create a national computer network that will permit health care companies to transmit records electronically.²³⁷ At a minimum, the mere existence of such a database creates the potential for intentional or inadvertent disclosure of highly sensitive information.²³⁸ It also does little to protect individuals whose genetic history may reveal a predisposition for certain inherited diseases.²³⁹ The

²³⁶ See Health Insurance Portability and Accountability Act of 1996 [hereinafter HIPAA], Pub. L. No. 104-191, 110 STAT. 1936 (Aug. 21, 1996).

²³⁷ *Id.* §§ 261–62. The Bill requires doctors to make available “any information, whether oral or recorded in any form or medium,” presumably including the doctor’s confidential notes and communications. *Id.* § 262(a)(4); cf. John Schwartz, WASH. POST, Aug. 4, 1996, at A23 (noting that there is no consent requirement for a patient’s records to be made available on the electronic database, and quoting Denise Nagel of the National Coalition for Patients’ Rights as expressing fear that the ready availability of “cradle-to-grave-records” could affect the individual’s future prospects for obtaining employment or insurance, and thereby lead people to become less apt to seek health care when they need it).

²³⁸ Although HIPAA does establish penalties for some transfers of personal information, the very existence of such a database is *per se* a threat, as experience has shown. See, e.g., Sue Landry, *AIDS List Is Out: State Investigating Breach*, ST. PETERSBURG TIMES, Sept. 20, 1996, at A1, available in 1996 WL 11941560 (noting the leaking of a confidential list of 4000 people with AIDS maintained at a county health unit).

²³⁹ Although the Kennedy-Kassebaum Bill will prevent the charging of higher premiums or the denial of coverage on account of genetic history by insurance companies, these restrictions protect only those individuals in group health insurance plans, and do not extend to people in individual plans. See K.C. Swanson, *New Test, New Concerns*, NAT’L J., Jan. 4, 1997, available in 1997 WL 7227937, at *5–6. Nor, for that matter, are insurance companies prevented from raising their rates on entire groups, which may lead to the denial of coverage through indirect pressures on employers. See *id.* at *6. Further, an individual making any kind of anti-discrimination claim would have to surrender his or her privacy, which could

Kennedy-Kassebaum Bill also requires Congress to enact legislation protecting certain health information.²⁴⁰ The Secretary of Health and Human Services has just released official recommendations pursuant to the Act.²⁴¹ These recommendations would provide significant substantive protections for patient health information where the patient is not a party to the proceeding,²⁴² but would provide no additional substantive protections where the patient is a party.²⁴³ Two bills proposed in Congress last year would have provided greater protections for the patient's privacy, particularly with regard to the electronic communication of medical records, but neither bill was called up for a vote.²⁴⁴

potentially lead to difficulties obtaining a job or insurance elsewhere in the future, thus deterring him or her from ever filing suit. *See id.* at *8.

²⁴⁰ *See* HIPAA, *supra* note 236, § 264(c)(2). If Congress fails to act within 36 months, the Secretary of Health and Human Services will be required to issue regulations within 42 months of the enactment of HIPAA. *See id.* § 264(c)(1).

²⁴¹ *See Confidentiality of Individually-Identifiable Health Information: Recommendations of the Secretary of Health and Human Services, Pursuant to Section 264 of the Health Insurance Portability and Accountability Act of 1996, available in <<http://aspe.os.hhs.gov/admsimp/pvcrec0.htm>> .*

²⁴² Where the patient is not a party to the proceeding:

We recommend that providers and payers be permitted to disclose health information in a judicial or administrative proceeding (other than a proceeding in which the patient is a party and has put his or her condition at issue), pursuant to an administrative or judicial subpoena if the patient has been notified in advance and has not objected in a timely manner.

We recommend that if the patient has been notified in advance and does object in a timely manner, the official issuing the subpoena not order the information disclosed unless the person seeking the information has demonstrated that

—there are reasonable grounds to believe that the information will be relevant to the proceeding; and

—the need for the information outweighs the privacy interest of the patient.

We recommend that in determining whether the need for the information outweighs the privacy interest of the patient, the court or agency consider

—the particular purpose for which the information was collected;

—the degree to which disclosure of the information will embarrass, injure, or invade the privacy of the patient;

—the effect of the disclosure on the patient's health care;

—the importance of the information to the lawsuit or proceeding; and

—any other factor deemed relevant by the court.

We recommend that a covered entity be permitted to challenge a demand for health information on any grounds available under this or other law.

Id. at Part II.E.12.

²⁴³ *See id.* at Part II.E.11.

²⁴⁴ *See* H.R. 3482, 104th Cong. (1996) (sponsored by Rep. McDermott (D-Wash.)); S. 1360, 104th Cong. (1996) (co-sponsored by Sens. Bennett (R-Utah) and Leahy (D-Vt.)).

Similar bills have been proposed recently,²⁴⁵ one of which has been endorsed by President Clinton.²⁴⁶

V. CONCLUSION

It is an aphorism of American jurisprudence that without personal liberty, there can be no justice.²⁴⁷ And if there is one lesson to be garnered from "reason and experience," it is that liberty exists only insofar as people can act with the advance expectation of privacy.²⁴⁸ With regard to physician-patient

²⁴⁵ See H.R. 306, 105th Cong. (1997) (sponsored by Rep. Slaughter (D-N.Y.)); H.R. 328, 105th Cong. (1997) (sponsored by Rep. Solomon (R-N.Y.)); H.R. 341, 105th Cong. (1997) (sponsored by Rep. Stearns (R-Fla.)); H.R. 1815, 105th Cong. (1997) (sponsored by Rep. McDermott (D-Wash.)); S. 89, 105th Cong. (1997) (sponsored by Sen. Snowe (R-Me.)); S. 422, 105th Cong. (1997) (sponsored by Sen. Domenici (R-N.M.)).

²⁴⁶ See *White House Calls [F]or Immediate Action on Slaughter Bill* (Gov't Press Release, July 14, 1997), reprinted in 1997 WL 12100999.

²⁴⁷ As Justice Stevens once noted, the Constitution as interpreted "presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 781 (1986) (Stevens, J., concurring); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (noting that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (contending that "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law"). The First Amendment right to free speech, for instance, embodies one of this country's most fundamental ideals—that of open debate and free expression. In times of crisis, however, courts have tended to abridge this right in favor of expediting judicial sanction, thereby chilling the exercise of this right. Compare *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction for advocacy of future seditious activity at height of "Red Scare") with Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), in *THE PORTABLE THOMAS JEFFERSON*, *supra* note 151, at 290, 292 (stating that "[i]f there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it").

²⁴⁸ See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt."); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("The right to be let alone is indeed the beginning of all freedom."); Arthur J. Goldberg, *Can We Afford Liberty?*, 15 AKRON L. REV. 1, 3 (1981) ("Individual rights cannot exist in the absence of individual privacy . . ."); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956) ("[T]here are things even more

communications, *reason* tells us that information concerning an individual's health "is perhaps the most intimate, personal, and sensitive of any information maintained about an individual."²⁴⁹ And when the needs of individual privacy and societal justice collide, *experience* tells us that we should err on the side of privacy—that we should strive to leave as much of a person's life to his or her own conscience as society can rationally bear.²⁵⁰ The United States Supreme Court's rationale in *Jaffee* suggests that, where a privilege serves a public good of transcendent importance, where the benefits of granting the privilege outweigh the relatively modest value such information might have as evidence, and where there is near unanimity among the states that such a privilege is justified, reason and experience support the recognition by federal courts of an evidentiary privilege. The federal courts should apply this reasoning to recognize a general physician-patient privilege as well. The extension of *Jaffee* to the physician-patient relationship and medical records, including genetic testing, would affirm the basic dignity of the human being, and reassure the individual of his or her right to an essential sphere of privacy from governmental observation or public disclosure in which he or she can honestly and openly seek medical assistance. Where the individual takes the affirmative step of seeking preventative health care, and even more so where a medical condition or genetic predisposition posing a direct threat to the individual's life or health compels him or her to obtain medical services, it is essential for the individual to be able to seek consultation, diagnosis, and treatment without fear of unwarranted disclosure. In all but the most compelling circumstances, this interest in personal privacy outweighs the modest evidentiary benefit it may provide the party seeking the disclosure. Nearly all states have reached this decision, either through their legislatures or in their courts. Thus, according to the standards established by the Supreme Court in *Jaffee*, reason and experience

important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations.").

²⁴⁹ Lawrence O. Gostin et al., *Privacy and Security of Personal Information in a New Health Care System*, 270 JAMA 2487, 2487 (1993).

²⁵⁰ In the words of Lewis Mayers:

Is it not hard to justify in a free society the exertion of naked power by which a private citizen is with such dubious necessity singled out and compelled against his will to make damaging disclosures regarding his own private affairs . . . [F]ar from withdrawing or in any way limiting his privilege against self-incrimination, there is much to be said for enlarging his privilege of silence, excusing him from making disclosures which, though not criminatory, are likely to be injurious to him.

LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 132-33 (1959), *quoted in* Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 220-21 (1960).

clearly support the federal courts' recognition of a physician-patient confidentiality privilege under Rule 501, and its affirmation of human dignity and personal privacy. Our system of justice in the context of a free society demands nothing less.